85-1304

No. _____

In the Supreme Court of the United States

October Term, 1985

SPANG & COMPANY,
Petitioner,

v.

MATTHEW A. DelGROSSO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. May a Pension Plan Sponsor, under the authority of Section 4044(d) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1344(d), promulgate a Pension Plan with provision for recapture of surplus assets upon Plan termination after all liabilities to Plan participants and their beneficiaries have been satisfied, where the underlying collectively negotiated pension agreement prohibits only the reversion of employer contributions?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Spang & Company ("Spang")[1] respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that Court's judgment of July 30, 1985 in *Matthew A. DelGrosso, et al. v. Spang & Company*, Nos. 84-3618 and 84-3644.[2]

OPINIONS BELOW

The opinion of the Court of Appeals, from which this appeal is taken, is reported at 769 F.2d 928 (3d Cir. 1985), and appears as Appendix B hereto. There were three opinions in the District Court. The first opinion of the District Court is reported at 586 F. Supp. 177 (W.D. Pa. 1983), and appears as Appendix C hereto. The second opinion of the District Court is reported at 5 EBC 1656 (W.D. Pa. 1984), *aff'd in part and rev'd in part*, 769 F.2d 928 (3d Cir. 1985), and appears as Appendix D hereto. The third opinion of the District Court is unreported and appears as Appendix E hereto. The Order of Court denying petitioner's petition for rehearing and for rehearing in banc appears as Appendix F.

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[1]Spang & Company is a privately-held Pennsylvania corporation. It has no parent company, affiliate or subsidiary, except a wholly-owned subsidiary.

[2]A listing of the parties to the proceeding in the Court of Appeals, as required by Supreme Court Rule 21.1(b), is set forth as Appendix A hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered July 30, 1985. The Order of the Court of Appeals denying a timely petition for rehearing was dated and filed on November 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4044(d) of ERISA, 29 U.S.C. §1344(d), provides as follows:

> (1) Any residual assets of a single-employer plan may be distributed to the employer if—
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.
>
> (2) Notwithstanding the provisions of paragraph (1), if any assets of the plan attributable to employee contributions, remain after all liabilities of the plan to participants and their beneficiaries have been satisfied, such assets shall be equitably distributed to the employees who made such contributions (or their beneficiaries) in accordance with their rate of contributions.

Section 404 of ERISA, 29 U.S.C. §1104, provides in pertinent part as follows:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) For the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

STATEMENT OF THE CASE

This case relates to the Pension Plan of the Ferroslag Division of Spang for Employees in the Bargaining Unit Represented by the United Steelworkers of America AFL-CIO-CLC (the "Plan"), which is a pension plan sponsored by Spang and covered by ERISA. Spang is contractually obligated to maintain the Plan by a collectively bargained pension agreement with the United Steelworkers of America ("USW"), which is not a party to this action.

Spang operated a Ferroslag Division with plants located in Chicago, Illinois and Lorain, Ohio. Hourly employees of the Ferroslag Division were represented by the USW. A collective bargaining agreement was negotiated every three years setting forth terms and conditions of employment. A separate pension agreement was also negotiated every three years at the same time setting forth terms and conditions of retirement. The most recent such pension agreement, effective beginning on November 1, 1980, was in effect throughout the course of this proceeding and remains in effect today.

Each such pension agreement required Spang to provide for each covered employee of the Ferroslag Division, who retired at an eligible age with sufficient continuous service (e.g., 65 years old and 10 years service or 60 years

old and 15 years service), a defined monthly pension benefit calculated by multiplying the employee's years of continuous service by a certain dollar amount.[3] Subsequent to the enactment of ERISA, provisions were added for deferred vested benefits for employees who separated from service prior to attaining pension eligibility.

In order to fund the required benefits, the pension agreement between Spang and the USW prior to ERISA provided that Spang would make contributions to a pension fund calculated by multiplying a specific number of cents by the hours worked by the covered employees. The pension agreement prior to ERISA further indicated that Spang's funding obligation was limited to the amount of the cents-per-hour contributions. After ERISA took effect, Spang and the USW discontinued the cents-per-hour calculation and agreed that Spang would make the contributions that would be necessary to provide the agreed defined benefits as determined by an independent professional actuary.

Thus, if the fixed benefits ultimately required Spang to make contributions above the level of funding required pre-ERISA, Spang had to do so and its collectively negotiated bargain was a bad one. On the other hand, if the fixed benefits ultimately required Spang to provide less than they would have under the cents-per-hour contributions, then its collectively negotiated bargain was a good one.

In 1981 Spang, as Plan Sponsor, adopted a formal Pension Plan which provided that it was to be construed

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[3]For example, the 1970 Pension Agreement provided that the monthly amount of a normal pension "shall be five dollars and thirty cents ($5.30) multiplied by the employee's years of continuous service."

consistent with the collectively negotiated pension agreement,[4] and which further provided that in the event of termination of the Plan, assets would first be allocated to satisfy all liabilities, vested or non-vested, and that any remaining surplus assets would revert to Spang.[5] The latter provision was adopted pursuant to Section 4044(d) of ERISA, 29 U.S.C. §1344(d).

Spang's Ferroslag business rapidly deteriorated. Spang was forced to close its Chicago, Illinois operation in 1979 when Spang lost its slag processing contract with United States Steel Corporation, and was forced to close its Lorain, Ohio operation in 1982 for the same reason.

On each such occasion, Spang fully vested the entire accrued benefit of every employee, whether they were eligible for a deferred vested pension benefit or not.

Subsequent to the discontinuation of the Lorain, Ohio operation, this suit was commenced by 19 of the 51 former employees of that plant. All 19 were relatively short service employees. None had completed the years of service necessary to be eligible for a deferred vested benefit, but Spang

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[4]The Preamble to the Pension Plan provided in pertinent part as follows:

> During the period of time that there is in effect a collective bargaining agreement which specifically deals with pensions as to those employees that the Union represents, and to such employees only, the said Pension Plan shall be construed in a manner consistent with those provisions as are provided for in any such collective bargaining agreement or any pension agreement addendum thereto during their term.

[5]The pension agreement provided that contributions by Spang to the pension trust fund could not revert to it, but the pension agreement made no reference to reversion of assets other than Company contributions. Section 12.6 of the pension agreement stated that "*contributions* made by the Company hereunder may not, under any circumstances, revert to the Company." (Emphasis added).

had, pursuant to ERISA, vested their entire accrued benefit. After making provision to satisfy all liabilities to Plan participants and their beneficiaries, including the 19 Plaintiffs, there remained in the pension fund an actuarial surplus. The suit made claim that, under the pension agreement between Spang and the USW, these 19 former employees were entitled to the actuarial surplus in the pension fund.[6] The District Court found for Spang and against these 19 plaintiffs on cross-motions for summary judgment.

Upon appeal, the Third Circuit (Garth, J.) affirmed the District Court's decision that the pension agreement bestowed no right to any surplus on the 19 plaintiffs. The Third Circuit, however, further found that Spang's inclusion in its Pension Plan of the provision for reversion of surplus after satisfaction of all liabilities was invalid because it conflicted with certain language in the pension agreement quoted in footnote 5, *supra*.[7] Having invalidated Spang's provision for reversion of any actuarial surplus remaining after satisfaction of all liabilities, the Court then decreed the surplus distributed to all Lorain, Ohio Plan Participants under a form of "intestate" distribution set forth by the Pension Benefit Guaranty Corporation ("PBGC") in its regulations. The Court ordered this distribution to be accomplished under the supervision of an Independent Pension Plan Administrator to be appointed

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[6]As Section 4044(d)(1)(A) of ERISA provides, surplus assets are those remaining after "all liabilities of the plan to participants and their beneficiaries have been satisfied . . ." 29 U.S.C. §1344(d)(1)(A).

[7]Spang's cents-per-hour contributions for Lorain totaled $189,114.09. The entire pension trust fund for Lorain, however, totaled $721,509.00 as of August 1, 1982. The Third Circuit's decision obliterates the distinction between contributions and all other assets in the fund by permitting distribution of the entire Lorain fund based upon a provision of the pension agreement addressing only contributions.

by the District Court on remand, despite the fact that Plaintiff's Pretrial Statement in the District Court never requested such relief and the issue was not briefed in or reviewed by the District Court and was not briefed in the Court of Appeals.

This distribution, if permitted, will result in pension benefits for the Lorain, Ohio Plan Participants far exceeding the amount of their defined benefit under the pension agreement, far exceeding the defined benefit being received by Lorain Ferroslag employees who retired prior to the closing of operations, and far exceeding the defined benefit being received by Ferroslag employees who worked at Chicago.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Raises An Important National Issue And Conflicts With The Results In Other Circuits

Other than tax reform, no topic has generated more Congressional consideration and less consensus than that of pension plan terminations. Despite numerous hearings and proposals, Congress appears to be nowhere near passing any legislation.[8] In the absence of such legislation, Section 4044(d) of ERISA, 29 U.S.C. §1344(d), the statutory

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[8]H.R. 2701, a proposed "Plan Termination and Reversion Control Act of 1985," was introduced by Congressman Edward R. Roybal on June 6, 1985. Reprinted at pp. 313-377 of Transcript of Joint Hearing before the House Select Committee on Aging and the House Subcommittee on Labor-Management Relations, 99th Congress, First Session (June 12, 1985). Attached hereto as Appendix G is a copy of the Administration's September 20, 1985 letter written by William E. Brock, Secretary of Labor, James A. Baker III, Secretary of the Treasury, and Kathleen P. Utgoff, Executive Director of the Pension Benefit Guaranty

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section in dispute herein, will continue to govern pension plan terminations to recapture surplus assets.[9]

That Section 4044(d)'s interpretation is of great national importance is evidenced by the number and size of pension plan terminations. Since 1980, about 10 billion dollars has been recovered from the termination of overfunded pension plans. 13 *BNA Pension Reporter* 47 (January 13, 1986).

Moreover, apart from constituting a matter of national significance, the Third Circuit's interpretation of Section 4044(d) conflicts with the result in every other Circuit decision on the issue of plan terminations. *Washington Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257 (D. D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984); *Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980); *In Re C. D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273, 1275 (3d Cir. 1978).

(Continued)

Corporation in opposition to a proposal by Congressman Roybal for a nine-month moratorium on pension plan terminations involving surplus assets pending consideration of H.R. 2701.

[9] "Under current law, other than excess assets attributable to employee contributions, I believe that it is clear that they belong to the employer, provided that they meet the requirements that are expressly set out in section 4044 of ERISA. I think it is important to note that in a defined benefit plan, the promise is the benefit and that the employer assumes all risk of investment performance, whether it be good or bad, in meeting that promise. I think that is the prevailing aspect." Statement of David M. Walker, Acting Executive Director, Pension Benefit Guaranty Corporation, printed at p. 123 of Transcript of Joint Hearing before the House Select Committee on Aging and the House Subcommittee on Labor-Management Relations, 99th Congress, First Session (June 12, 1985).

See also District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468, 1478-1479 (S.D.N.Y. 1983).

The Third Circuit rendered two holdings, not contested below by any of the parties, which are the predicate for Spang's position that the Court of Appeals' ultimate decision was erroneous and unprecedented. First, the Third Circuit recognized that Spang was obligated under Section 402 of ERISA, 29 U.S.C. §1102, to draft a pension plan notwithstanding the existence of a collectively bargained pension agreement. 769 F.2d at 935, fn. 8 (App. B, 16b). Second, the Third Circuit held that Section 4044(d) of ERISA "permits reversion so long as no contractual provision prohibits it." 769 F.2d at 936, fn. 9 (App. B, 17b).

Having correctly stated the above two propositions, the Third Circuit then went on to erroneously hold that the language in the pension agreement which says "the contributions made by the Company hereunder may not, under any circumstances, revert to the Company" constituted a contractual provision which prohibited reversion to Spang not only of *contributions* but also of *all other Lorain assets*. 769 F.2d at 938-39 (App. B, 23b). (emphasis added).[10] The

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[10]The Third Circuit also found that Spang breached its fiduciary duty to Plan participants in violation of Section 404 of ERISA, 29 U.S.C. §1104. 769 F.2d at 937, 938 (App. B, 20b-23b). The case law, however, is unanimous that the creation and termination of a plan are not fiduciary functions under ERISA. *Van Orman v. American Insurance Co.*, 680 F.2d 301, 313 (3d Cir. 1982); *District 65 UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1477-78 (S.D.N.Y. 1983) ("the decision to terminate the Retirement Plan is exempt from ERISA's fiduciary standards. . . plaintiffs erroneously seek to have the fiduciary provisions in ERISA applied to the decision to terminate and the arrangements made as a consequence to that decision"); *Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1262 (7th Cir. 1985); *Sutton v.*

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holding that the above-quoted language affirmatively prohibits reversion of all assets not needed to satisfy Pension Plan liabilities is directly contrary to the decisions in *Washington Star, Pollock* and *Moyer.*

In *Washington Star*, the applicable pension trust agreement contained language of apparent non-alienation which was much stronger than the agreement in this litigation. The *Washington Star* agreement prohibited reversion of all assets of the fund, not just employer contributions, as follows:

> 1. This Trust Agreement *may be amended from time [to time] by the Employer, provided that no amendment shall divert the Trust Fund as then constituted, nor any part thereof, to a purpose other than for the exclusive benefit of employees covered by the Plan or their beneficiaries,* . . .

555 F. Supp. at 258 (emphasis in original). Notwithstanding the above "prohibition," the Washington Star Company amended its pension trust agreement upon the closing of its newspaper to provide for reversion to it of surplus assets remaining after the satisfaction of all liabilities. The District of Columbia Circuit Court of Appeals affirmed the District Court's finding that the amended reversion language was valid and that Washington Star Company was entitled to the surplus assets. *See also Pollock* and *Moyer, supra.*

The *Washington Star, Pollock* and *Moyer* holdings were rendered for good reason. ERISA requires that funds

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Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984).

be used for the exclusive benefit of pension plan participants. Section 403(c), 29 U.S.C. §1103(c). However, if this type of very general ERISA language were sufficient in itself to bar reversion, it would *de facto* repeal Section 4044(d), 29 U.S.C. §1344(d), which specifically permits reversion. *Washington Star, Pollock* and *Moyer* all sensibly interpret Section 4044(d), 29 U.S.C. §1344(d), as a specific statutory exception to the exclusive benefit language required by ERISA. *See* Section 401(a)(2) of the Internal Revenue Code, 26 U.S.C. §401(a)(2).

Unless this case is reviewed, the Third Circuit's decision will cast grave doubt on the ability of employers to recapture surplus assets. Moreover, employers will not know when establishing pension plans whether the *Washington Star, Pollock* and *Moyer* line of cases governs terminations or whether the conflicting Third Circuit position prevails. This uncertainty, if permitted to stand, will chill the desire of employers to create new pension plans or to conservatively fund existing plans.

The Third Circuit attempted to forestall the obvious conflict between Circuits by distinguishing both *Washington Star* and *Moyer* on several artificial and incorrect grounds.

First, the Third Circuit deemed it distinguishable that the Spang Pension Plan is comprised of funding attributable only to the cents-per-hours days. 769 F.2d at 935 (App. B, 15b-16b). This is incorrect as a matter of undisputed fact because, as previously noted, a very large part of the Lorain monies is attributable to investment performance and asset appreciation and a very small part is attributable to contributions made prior to ERISA.

In any event, benefits to participants have always been defined by a precise formula determined by multiplying years of continuous service times a collectively negotiated fixed dollar amount. This is a defined benefit plan under ERISA parlance, the same as the plans in *Washington Star, Pollock* and *Moyer*, even though the amount of contributions was formerly defined rather than indefinite. *Nachman Corp. v. PBGC*, 446 U.S. 359, 363-64 n. 5 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 591 n. 15 (1977); *Connolly v. PBGC*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).[11]

More importantly, however, at the time of the Lorain, Ohio closing, the Spang-USW pension agreement did not require any cents-per-hour contributions. By that time, Spang and the USW had collectively negotiated a change to an indefinite form of funding, as might be actuarially necessary, while retaining the concept of a fixed benefit determined by multiplying years of continuous service times a collectively negotiated fixed dollar amount. This is particularly significant because investment performance and asset appreciation does not constitute deferred compensation vested in any particular employee. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 560-561

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[11]Only defined benefit plans are covered by the termination insurance program in Title IV of ERISA, and the *Connolly* decision affirmed that plans with cents-per-hour contributions and defined benefits are thereby covered. Effectively contradicting *Connolly*, the Court of Appeals decision would cast grave doubt on whether multiemployer pension plans are covered by the termination insurance provisions of ERISA, since virtually all multiemployer plans have cents-per-hour contributions and defined benefits. This would be intolerable in view of the multitude of ERISA termination insurance provisions which provide on their face that they apply to multiemployer plans (e.g., ERISA Section 4022, 29 U.S.C. §1322) and in view of the practical consequences of depriving hundreds of thousands of multiemployer plan participants of the guaranties of the PBGC.

(1979). Spang assumed the risk of poor investment performance and therefore should obtain the benefit of favorable performance.[12]

The Third Circuit further erroneously held that in order to be recoverable by the employer any surplus after satisfaction of liabilities must arise from funding the pension trust in an abundance of caution. It then impliedly concluded that since the level of contributions was required by agreement, funding in an abundance of caution was not present. However, overfunding in an abundance of caution is not a prerequisite to recovery of surplus assets from an overfunded pension plan. The Internal Revenue Service definition of "actuarial error," which is uniformly applied in ERISA litigation, contemplates all excess assets to be caused by actuarial error. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Dyneer Corporation*, 747 F.2d 335, 337 (6th Cir. 1984) ("'when fixed and contingent liabilities are discharged through the purchase of a contract or contracts from insurance company [sic] which provides the benefits with respect to individuals for whom the liabilities are determined, the remaining assets may be considered surplus arising from actuarial error . . . *Rev. Rul.* 83-52, 1983-13 C.B. 87.'"); *Bryant v. International Fruit Products*, 604 F. Supp. 890, 892 (S.D. Ohio 1985) ("the words 'actuarial error' have been defined by the Internal Revenue Service in a way that includes even intentional overfunding."); Ronald A. Pearlman, Assistant Secretary of the Treasury for Tax Policy, 12 *BNA Pension Reporter* 482, 484 (April 1, 1985) ("it generally is the case that *all excess*

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[12]PBGC Executive Director Kathleen Utgoff recently remarked that "it is not right for plan sponsors to bear all of the downside risk, but none of the upside potential." 13 *BNA Pension Reporter* 47 (January 13, 1986).

assets upon plan termination result from actuarial error." (emphasis added)).[13]

Second, the Third Circuit distinguished both *Washington Star* and *Moyer* on the purported basis that Spang had no authority to unilaterally amend the terms of the collectively negotiated pension agreement whereas the governing language in the above cases provided the employer with the right to amend. 769 F.2d at 935-936 (App. B, 16b).

As the Court of Appeals itself recognized, Spang did not need to have express authority in the pension agreement to add an additional term which is not inconsistent with any other term in the pension agreement. It is only required that there be no contractual *prohibition*, not that there be contractual *authorization*. The Third Circuit in fact so held below and neither party challenges this holding. 769 F.2d at 936, fn. 9 (App. B, 17b). Spang was free to adopt a pension plan provision for the recovery of surplus assets existing after satisfaction of all liabilities to Plan

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[13] "Actuarial errors, in the sense used in the regulations, are not, of course, merely mathematical errors. They may arise because of a variance between the assumptions and actual experience. . . . Similarly, if the earnings on fund investments are greater than those reasonably assumed, or the turnover is at a rate which is more rapid than reasonably anticipated, . . . an excess arises, which, if it remains on termination of the trust after all liabilities to employees and their beneficiaries are provided for, may be recovered by the employer."

Isidore Goodman, Chief of the Pension Trust Branch of the Internal Revenue Service, "The Role of the Actuary in Processing Pension and Profit Sharing Cases before the Internal Revenue Service" (October 7, 1958), *reprinted in Isidore Goodman on Qualified Pension and Profit Sharing Plans Under the Internal Revenue Code* (Prentice-Hall).

participants.[14] Indeed, the provision in *Washington Star* which allowed amendment was itself an amendment made without any prior authorization.

In view of the above, it is clear that the Third Circuit's attempt to distinguish *Washington Star* and *Moyer* is superficial at best. There is indeed a focused inconsistency between the decisions.

Not only is the Third Circuit's decision unprecedented under Section 4044(d) of ERISA and in conflict with the results in other Circuits, it is also subversive of the federal labor law's acknowledged deference to the collective bargaining process.

The USW negotiated away the benefit of the investment performance on the cents-per-hour contributions which had been made by Spang prior to ERISA in exchange for a promise by Spang to fund the specific defined benefits, without limitation. The Third Circuit's opinion impermissibly constitutes a deprivation of the right of the USW and Spang to collectively negotiate the best deal possible for their respective constituencies. In this case, the Third Circuit has utilized ERISA to deprive Spang of the benefit of a collectively negotiated bargain while having required it at all times to be bound by the additional obligation which it assumed in terms of potential indefinite funding.

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[14]Spang does not claim that it is entitled to Lorain, Ohio contributions, all of which are necessary to satisfy liabilities to Plan participants and their beneficiaries. Nor does Spang claim entitlement to that portion of the asset appreciation which is needed to satisfy Plan liabilities. Spang is entitled to, and has provided for, recovery of *surplus* assets which are not comprised of any Lorain, Ohio *contributions* or any other funds that are necessary to pay Plan liabilities.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

In addition to the parties named in the caption of the case in this Court, the following were Appellants and Cross-Appellees in the Court of Appeals:

James P. Blair
Lester Ware
Jimmie Mines, Jr.
Joe Henry
Robert C. Trainer
Jay T. Richler
Robert Hardwick
Jerome J. Phillips, Sr.
Gilbert Weese
Larry K. Hill
Charles G. Church, Jr.
John R. Alves
Barry K. Ralz
Donald Lee Adams
Charles Woodrum
Richard W. Martineau
Hubert J. Lee
Charles E. Van Riper

APPENDIX B

Matthew A. DELGROSSO, James P. Blair, Lester Ware, Jimmie Mines Jr., Joe Henry, Robert C. Trainer, Jay T. Richler, Robert Hardwick, Jerome J. Phillips, Gilbert Weese, Larry K. Hill, Charles G. Church Jr., John R. Alves, Barry K. Ralz, Donald Lee Adams, Charles Woodrum, Richard W. Martineau, Hubert J. Lee, Appellants,

v.

SPANG AND COMPANY, Appellee.

Matthew A. DELGROSSO, James P. Blair, Lester Ware, Jimmie Mines Jr., Joe Henry, Robert C. Trainer, Jay T. Richler, Robert Hardwick, Jerome J. Phillips, Gilbert Weese, Larry K. Hill, Charles G. Church Jr., John R. Alves, Barry K. Ralz, Donald Lee Adams, Charles Woodrum, Richard W. Martineau, Hubert J. Lee, Cross-Appellees,

v.

SPANG AND COMPANY,
Cross-Appellant.
Nos. 84-3618, 84-3644.

United States Court of Appeals,
Third Circuit.

Argued June 12, 1985.
Decided July 30, 1985.
As Amended Aug. 14 and
Oct. 31, 1985.

Daniel P. McIntyre (argued), Joy E. Klopp, Pittsburgh, Pa., for appellants-cross appellees.

Robert F. Prorok (argued), Reed, Smith, Shaw & McClay, Pittsburgh, Pa., for appellee-cross appellant.

Before WEIS, GARTH, and STAPLETON, Circuit Judges.

OPINION OF THE COURT

GARTH, Circuit Judge:

Matthew Delgrosso, et al, the non-vested participants[1] in the Spang pension plan (the Fund) for its Lorain, Ohio ferro slag plant, sought a ruling which would prevent Spang & Company from appropriating to itself the surplus assets of the Fund and would instead order those assets to be distributed among the non-vested participants. The district court rejected Delgrosso's claims and entered summary judgment for Spang, clearing the way for Spang & Co. to receive the surplus assets of the Fund remaining after Spang had funded all vested benefits through insurance contracts. Delgrosso appealed to this Court.

Because we conclude that Spang violated its fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1104 by unilaterally amending the pension plan to provide for a reversion of assets to Spang, we reverse so much of the judgment of the district court which held otherwise, and which did not provide for an allocation of the surplus funds among vested and non-vested participants.

I.

Most of the underlying facts are undisputed. The Fund has been maintained since 1963 under a succession

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[1] Throughout the opinion we will refer to the non-vested participants, the plaintiffs, as "Delgrosso."

of collectively bargained pension agreements between Spang and United Steel Workers (USW). The most recent of these pension agreements was an agreement effective for the period November 1, 1980 to November 1, 1983 (the Pension Agreement). Under earlier agreements, the Fund was to be maintained as a *defined contribution* plan—that is, Spang was required to contribute $.40 per hour worked for each employee, and the employee would receive a pension in the amount of however much pension the Fund could buy once he retired.

In 1974, the plan was converted into a *defined benefit* plan, under which Spang was obligated to maintain funding for the plan at whatever level was actuarially necessary in order to provide the guaranteed benefits specified under the collective bargaining agreement. As it worked out, the earlier contributions which Spang had been required to pay into the Fund have always been adequate to fund the plan's pension obligations and Spang has made no contributions since 1974. Thus, all contributions to the Fund were contributions under a *defined contributions* plan and none were made under an actuarially based defined benefit plan.

A.

Since 1970 all pension agreements have contained a clause unequivocally prohibiting any reversion to Spang of its contributions. This clause appears in the 1980 Pension Agreement:

> 12.6 The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way

limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement.

Section 13 of the Pension Agreement provides priorities for funding of benefits in case of insufficient assets upon plan termination. Section 13.3 also provides:

> 13.3 In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:
>
> (a) The reserves applicable to those Participants who have been transferred to other locations.
>
> (b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.
>
> (c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.
>
> (d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

For the purpose of this partial termination Section, those Participants who are on layoff and if recalled would not have a break in Continuous Service for pension purposes will be considered as active Participants for the allocation under (d) above.

Subsequent to the effective date of the 1980 Pension Agreement, but *prior* to its expiration date, several significant events occurred. First, the Fund was divided into two funds, one for each of Spang's two ferro slag plants. The fund covering employees at the Chicago, Illinois plant was terminated, as operations at the location were terminated in 1979. Second, to comply with ERISA's requirement of a permanent plan document, 29 U.S.C. §1102,[2] Spang unilaterally drafted a new plan (the Plan). Third, Spang closed its Lorain, Ohio plant and after provision for payment of the pensions, a surplus of over $100,000 remained in the Fund. It is this surplus which has given rise to this action.

B.

The Plan adopted by Spang incorporated two significant changes from the 1980 Pension Agreement, which was still in effect at the time Spang drew and adopted the Plan. First, the prohibition against reversion to Spang was removed, and the Plan specifically provided for reversion to Spang of Spang's earlier contributions:

(e) to the extent there remains a surplus of assets of the trust fund after fully funding all of the above determined liabilities due to benefits payable under the

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[2] 29 U.S.C. §1102(a)(1) provides in relevant part:

§1102. Establishment of plan

Named fiduciaries

(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument . . . .

Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.

Section 12.3(e). Second, the provision that remaining assets be distributed among non-vested participants was amended to provide distribution to non-vested participants only to the extent benefits had accrued by the time of plant closing:

(4) The remaining assets, if insufficient to provide for all remaining accrued benefits, will, if permitted by law, be prorated among the remaining Participants in relationship to each Participant's established seniority to the total seniority of all remaining Participants for whom allocation is to be made under this subparagraph (4).

* * * * * *

Such allocation shall not, however, be deemed to increase any accrued benefit nor be considered to create a benefit supplement.

Section 12.2. The Spang prepared Plan also allowed the Fund to finance health insurance premiums that Spang was under an independent obligation to finance on its own.

In order to support its contention that section 13.3 of the 1980 Pension Agreement was not intended to authorize a distribution of the Fund surplus to the non-vested employees, Spang filed affidavits and documents relating to the negotiating history of section 13.3. According to these documents, in 1970 USW sought ten year vesting in the pension fund. While rejecting 10 year vesting, Spang offered a provision which would result in the vesting of *all* employees upon a permanent termination of a plant location. Spang, contrary to Delgrosso's assertion, claims that

this negotiating history governs the interpretation of section 13.3 of the Pension Agreement, and supports its contention that the pensions for non-vested participants, such as Delgrosso, are limited to only a fraction of full pension benefits.

C.

Delgrosso sought neither arbitration nor retirement board review of his claims,[3] but rather filed a four count complaint in federal court. The first count alleged that Spang's refusal to allocate the entire surplus to Delgrosso violated its fiduciary duty under ERISA, 29 U.S.C. §1104(a)(1)(D). Delgrosso therefore sought an order directing Spang to comply with section 13.3 of the 1980 Pension Agreement. He also sought damages for delay.

The second count alleged that Spang intended to appropriate the surplus upon expiration of the 1980 Pension Agreement, again in violation of ERISA, and sought, inter alia, an immediate allocation of the surplus to the non-vested participants as well as the appointment of an independent administrator.

Count III alleged that the Plan promulgated by Spang violates the 1980 Pension Agreement and thus violates Spang's fiduciary duty under ERISA. This count sought reformation of the Plan and appointment of an independent administrator.

Count IV alleged a violation of the Labor Management Relations Act (LMRA) §301(a), 29 U.S.C. §185(a), in that Spang's unilateral amendment of the Plan violated its

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[3]Section 11.2 of the 1980 Pension Agreement provides for grievance and arbitration of a dispute over "any person's right to a pension or the amount of his pension."

collective bargaining agreement. This count also sought reformation of the Plan and appointment of an independent administrator.

Spang moved to dismiss the complaint for failure to exhaust contractual remedies. The district court denied this motion, finding that on the pleadings, Delgrosso alleged statutory as well as conractual claims. Both parties then filed cross motions for summary judgment. The district court granted summary judgment to Spang on all four counts.

The district court held that Spang was entitled to the surplus monies in the Fund. It reasoned that Spang had amended its Plan to permit reversion to Spang of the Fund's surplus and that ERISA allowed such a reversion if the Plan permitted it. The district court went on to hold that since ERISA permitted a reversion of such monies to the employer, here Spang, the Plan was not required to adhere to a collectively bargained clause which forbids such a reversion. In so holding, the district court rejected Delgrosso's claim to the surplus. It found the contract clause (section 13.3 of the Pension Agreement) ambiguous, and it interpreted the expressions of bargaining intent to require only that non-vested participants receive pensions pro-rated for their actual years of service. This interpretation of the contractual provisions was found to bar Delgrosso's LMRA claims for breach of a labor contract as well. Additionally, the district court found that plaintiffs' LMRA claims were contractual, not statutory, and thus could not be asserted absent exhaustion of contractual remedies and an allegation of USW's breach of the duty of fair representation.

II.

Initially, we must address Spang's contention that all of Delgrosso's claims, including the ERISA claims, are barred for failure to exhaust the arbitration remedy provided by the collective bargaining agreement. As we have observed, see note 3, supra, the Pension Agreement provided for arbitration.

This court has recently reaffirmed the national policy in favor of arbitration of labor disputes, and held that this policy applies equally to claims brought under ERISA as to those brought under the LMRA. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985). In *Barrowclough*, we noted the tension between the labor policy favoring arbitration and ERISA's policy of providing a federal forum for pension claimants. See also *Adams v. Gould, Inc.*, 687 F.2d 27 (3d Cir. 1982), *cert. denied* 460 U.S. 1085, 103 S.Ct. 1777, 76 L.Ed.2d 348 (1983). We drew a distinction in *Barrowclough* between claims based on pension rights created by contract, which must be arbitrated, and claims based on purely statutory rights created by ERISA, which may be asserted in federal court directly. See also *Viggiano v. Shenango China Division of Anchor Hocking Corporation*, 750 F.2d 276 (3d Cir. 1984). The claims asserted by Delgrosso in this case fall between these two categories; while Delgrosso asserts a breach of ERISA's statutory fiduciary duties by Spang, the essence of the alleged breach of fiduciary duty is a failure to abide by the terms of the Pension Agreement. Spang's compliance with ERISA thus depends on a construction of the Pension Agreement.

[1] We need not decide whether the exhaustion of arbitral remedies requirement generally applicable to labor agreement claims applies to bar the Delgrosso's claims in

this case, however, if these claims are not within the ambit of the Pension Agreement's arbitration clause. It is an elementary principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582,80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960).

While we are not unmindful of the principle that labor arbitration clauses are to be construed broadly, see *Barrowclough*, 752 F.2d at 938, we do not find that the arbitration clause in the Pension Agreement can be expanded to include the type of claims asserted by Delgrosso in this case. Unlike the broad arbitration clause at issue in *Barrowclough*, which covered "all disputes arising out of employment or the termination . . . of employment," the Pension Agreement clause covers only "any difference [that arises] . . . as to any person's right to a pension or the amount of his pension."[4]

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[4]The Pension Agreement arbitration clause provides in sections 11.1 and 11.2:

SECTION 11.—ADMINISTRATION AND APPEALS PROCEDURE

11.1 The administration of the pension benefits shall be in the charge of the Company.

11.2 If any difference (other than one arising under Section 6.5) shall arise between the Company and any Employee, Participant, the Union or any person claiming rights hereunder as to any person's right to a pension or the amount of his pension and agreement cannot be reached between the Company and a representative of the Union, such question shall be referred to an arbitrator to be selected by the Company and the Union in the manner provided in the Basic Agreement for the selection of arbitrators in the settlement of grievances. The arbitrator shall have authority only to decide the question pursuant to the provisions of this Agreement applicable to the question, but he shall not have authority in any

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[2] In this case, Delgrosso does not seek to establish his right to a pension; nor does he seek an increased pension. Rather, he claims that in winding up the business of the Fund, the company must distribute leftover assets in a particular way; that is, according to Delgrosso, the Fund may not distribute any assets to the company, and the Fund must distribute excess assets in accordance with the Pension Agreement. These claims, relating to the distribution of excess Fund assets, can by no stretch of language be considered a "difference . . . as to any person's right to a pension or the amount of his pension."

Because the reach of the arbitration clause cannot encompass the claims made by Delgrosso, Delgrosso cannot be compelled to exhaust contractual arbitration remedies under the Pension Agreement and Delgrosso may properly seek relief in the federal courts.[5] *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984); *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985); *Cf. Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980) (arbitration of disputes as to the "right to a pension or the amount of . . . pension" doesn't cover dispute over company's liability to fund benefits.)

(Continued)

way to alter, add to or subtract from any of such provisions. The decision of the arbitrator on any such question shall be binding on the Company, the Union, the Participant, and the person who asserted the claim. The fees and expenses of the arbitrator shall be shared equally by the Company and the Union.

[5]Because we find the Delgrosso's claims to be without the scope of the arbitration clause, we need not address his further argument that Spang's failure to include the arbitration remedy in its Plan description booklets, bars Spang from relying on the arbitration clause.

III.

We turn to the validity of Delgrosso's two challenges to the Plan document as drawn by Spang. First, Delgrosso contends that the Plan provision allowing reversion of excess assets to Spang violates section 12.6[6] of the Pension Agreement. Second, Delgrosso contends that the Plan provision for pro-rated pensions upon termination for non-vested participants violates section 13.3 of the Pension Agreement, which allocates all remaining assets to the "remaining participants."[7] Resolution of these issues requires application of the statutory requirements of ERISA as well as principles of contract interpretation.

A.

ERISA creates a fiduciary duty on the part of an employer administering a plan. 29 U.S.C. §1104 provides:

> **§1104. Fiduciary duties**
>
> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
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> (A) for the exclusive purpose of:
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> (i) providing benefits to participants and their beneficiaries; and
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> (ii) defraying reasonable expenses of administering the plan;
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> * * * * * *

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[6]The relevant portion of section 12.6 provides:

> "The contributions made by the Company hereunder may not, under any circumstances, revert to the Company."

[7]See text, supra, for the full text of section 13.3.

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

Delgrosso claims that the Pension Agreement is an "instrument governing the plan" and that Spang breached its section 1104(a)(1)(D) duty to administer the Fund in accordance with the Pension Agreement, because the Agreement affirmatively bars reversion to the employer. Despite this bar, Spang nevertheless promulgated a plan which provided for reversion to it. Further, Delgrosso points to the prohibited transactions provisions of ERISA, which specifically prohibit the transfer of plan assets to a "party in interest", including the employer. 29 U.S.C. §1106(a)(1)(D).

Spang counters by referring to ERISA section 1344, which allows such reversion under certain circumstances:

Distribution of residual assets; remaining assets

(d)(1) Any residual assets of a plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied.

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

Spang claims that in this case it has satisfied all the criteria under section 1344 and is therefore entitled to a reversion of the surplus. Resolution of this issue then turns on whether the section 1344(d)(1) requirement, that the plan provides for distribution to the employer, is met by a plan

provision unilaterally drafted by the employer, and which is inconsistent with the underlying Pension Agreement.

Spang draws our attention to two cases allowing reversion to an employer under similar circumstances. *Washington Baltimore Newspaper Guild v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd without opinion* 729 F.2d 863 (D.C. Cir. 1984); and *In Re C.D. Moyer Trust Fund*, 441 F. Supp. 1128 (E.D.Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978). In *C.D. Moyer*, an original plan provision in a defined benefit plan authorized the employer to alter or amend the pension agreement, providing that in no case should "any of the trust corpus or income be diverted to or revert to" the employer. Despite this provision, the employer amended the plan to provide that "any assets which remain in the Plan because of erroneous actuarial computations after the Plan has satisfied all its liabilities shall be returned to the employer." The district court upheld this amendment despite the restrictive language of the original plan, reasoning that "trust corpus or income" included "only so much of the funds as were necessary to insure full payment of the plan's obligations to participants." 441 F. Supp. at 1132. The court further reasoned:

> Having determined that the amendment is valid, it follows that a refund to the employer meets the requirements of section 4044(d)(1) of ERISA.
>
> This result is consistent with the policies underlying the enactment of ERISA. Employers will continue to fund their plans under ERISA guidelines, but will not be penalized for overfunding in "an abundance of caution" or as a result of a miscalculation on the part of an actuary. Thus, employees will continue to be protected to the extent of their specific benefits, but

> will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis.

441 F. Supp. at 1132-33.

In *Washington Star*, the original plan authorized the employer to amend the plan so long as no amendment diverted "any part of" the trust fund to a purpose other than the exclusive benefit of the employees. The original termination provision provided that "In no event shall any of the trust fund be . . . returned to the employer." The employer subsequently amended the termination provisions to provide that "any assets remaining in the trust Fund after the full satisfaction of all liabilities of the Plan to participants and their beneficiaries shall be returned to the employer." The district court found this amendment to be authorized and effective, reasoning that the "exclusive benefit" language of the amendment authorization adopted not only the fiduciary rule of ERISA, but the §1344(d)(1) exception to that rule, allowing reversion to the employer, as well. Since the termination provision was effectively amended to allow reversion, such a return of monies to the employer was held not to violate ERISA. The *Washington Star* district court also relied on the *C.D. Moyer* opinion's statement of the policy in favor of returning to the employer contributions in excess of those actuarially necessary to provide the defined benefits.

[3] Even if we were inclined to follow the reasoning of *C.D. Moyer* and *Washington Star*, and we are not persuaded that we should, neither case would require that the surplus assets should revert to Spang. Both cases are factually distinguishable because, unlike *Moyer* and *Washington Star*, the contributions made to the Spang Fund were all made pursuant to a defined *contribution* agreement.

Unlike the employers in *Moyer* and *Washington Star*, who paid more into the funds than ultimately proved necessary and who then sought refunds of over payments, Spang here seeks the return of those monies which it was contractually required to pay into the Fund as deferred compensation for its employees. No "overabundance of caution" is involved in this case. Indeed neither *Moyer* nor *Washington Star* is helpful here because the provision of the Pension Agreement prohibiting reversion, unlike the anti-version clauses in those cases, is simply not susceptible to a restrictive interpretation.

Unlike the plans in *Moyer* and *Washington Star*, Spang has never been given any authority to amend the Pension Agreement.[8] The reasoning underlying the *Moyer* and *Washington Star* cases hinged on a finding that the plans in those cases were effectively amended to allow reversion of plan assets to the employer. Here, the Pension Agreement makes no provision for amendment by Spang and precludes any change in terms during the duration of the Agreement. Under section 1104(a)(1)(D), the company (Spang) must administer the plan according to plan documents, which here includes the Pension Agreement. Since the Pension Agreement specifically provides that "[t]he contributions made by the Company hereunder may not, under any circumstances, revert to the Company," Spang failed to comply with the relevant plan documents.

Thus, any plan provision permitting reversion of Plan assets to Spang is not "in accordance with the documents and instruments governing the plan" under ERISA section

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[8]Spang claims that it became obligated to draft a permanent plan by ERISA §1102. While 29 U.S.C. §1102 does so require, §1102 does not authorize Spang to deviate from the terms of the Pension Agreement. See note 2 supra.

1104(a)(1)(D), and any Plan provision so providing is ineffective.[9] It follows that Spang breached its fiduciary duty by failing to administer the Plan in accordance with the governing documents, i.e., the Pension Agreement.

B.

[4] Delgrosso also contends that the Plan provision granting limited pro-rated pensions to non-vested participants violates the Pension Agreement. The Pension Agreement provides that, upon plant termination and after funding all vested obligations of the plan, "the remaining assets will be pro-rated among the remaining participants." Delgrosso therefore seeks reformation of the Plan to provide for distribution of all surplus assets to the non-vested participants.[10]

The construction to be given section 13.3 is highly problematic. On the one hand, the literal language provides: "the remaining assets will be pro-rated among the remaining participants." On the other hand, such a literal application would lead to absurd results: employees with

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[9]We cannot accept the district court's reliance on the second clause of 29 U.S.C. §1104(a)(1)(D) which adds the qualification "insofar as such documents and instruments are consistent with the provisions of this subchapter." The district court reasoned that the reversion prohibition in the Pension Agreement was "inconsistent" with 29 U.S.C. §1344(d), which permits reversion *if the plan document so provides*. We cannot agree that a provision in an agreement which prohibits reversion is inconsistent with a statutory provision which permits reversion so long as no contractual provision prohibits it. If anything, §1344(d) contemplates precisely the opposite result than that reached by the district court.

[10]Spang also argues that Delgrosso may make no claim under section 13.3 until the Plan is actually terminated, citing *Van Orman v. American Insurance Company*, 680 F.2d 301 (3d Cir. 1982). By its terms, however, section 13.3 is triggered upon *plant* termination, an event which has already occurred.

just a few years of service would receive pensions several times greater than the pensions of employees with thirty years of service. In the context of a defined benefit plan (such as the Spang plan had become), such a residuary clause would create a potential windfall for the non-vested participants. Therein lies the problem: when section 13.3 was drafted in 1970, benefits were to be paid according to *contributions* made on behalf of each employee. Each vested employee would receive a share of the total assets of the Fund based on contributions made on his behalf, leaving in the Fund only those assets attributable to contributions made on behalf of other participants. Under the likely expectations of the parties at the time of drafting section 13.3, the remaining assets would be nominal, and could be attributed directly to employer contributions made on behalf of those employees whose pensions had not yet vested as of a plant termination.

Thus, the existence of a large surplus, sufficient to fund vested benefits of a *defined benefit* plan several times over, was undoubtedly a situation not within the contemplation of the Pension Agreement as drafted. In such a situation characterized by Professor Farnsworth as an "omitted case," that is, a contingency not contemplated by the contract, a court may look to the expectations of the parties in order to interpret the agreement to deal with the unanticipated event. See E. Farnsworth, *Contracts* §7.15-.16 (1982). According to Professor Farnsworth:

> In interpreting the agreement, the court will also consider the foreseeability of the situation. If the court is convinced that the parties could not have foreseen it, and therefore could not have intended their agreement to cover it, the court may refuse to apply the contract language, despite its apparent applicability,

> and may find that the case before it is an omitted one. This result is particularly likely under long-term contracts, where unforeseeability is endemic.

Id. at 522.

On the record before us, the only evidence of the parties' expectations in 1970 is a letter Forsling wrote to Newell, proposing a clause that would grant non-vested employees deferred pro-rated pensions upon plant termination. Forsling testified at deposition that this language reflected his understanding that the Pension Agreement would provide for deferred pro-rated pensions to non-vested participants in the case of plant shutdown. William T. Marsh, Vice President of Spang, stated by affidavit that section 13.3 was the result of the Union's desire for earlier vesting, to which the company responded by proposing immediate vesting upon plant termination. According to Marsh:

> At no time during the negotiation of any of the pension agreements recited above, i.e., from 1963 through 1980, did the Union ever propose that the pension benefits of low seniority employees be better than the pension benefits of higher seniority employees.

Affidavit of William T. Marsh dated October 10, 1983 at p. 7.

Delgrosso submitted no affidavit or evidence that would contradict the understanding of the Pension Agreement reflected by Marsh's affidavit and Forsling's testimony, to the effect that non-vested participants were to receive no greater benefits than vested participants, with greater seniority. We thus conclude that the distribution scheme envisaged by section 12.2 of Spang's Plan (See Part

IB *supra*) more nearly reflects the expectations of the parties when section 13.3 was originally drafted, than does the interpretation of section 13.3 advocated by Delgrosso.[11]

IV.

Having concluded that Spang breached its fiduciary duty by implementing a Plan provision providing for reversion of Fund assets to itself in violation of the Pension Agreement, we must determine what relief appropriately may be granted to Delgrosso under ERISA and the LMRA. In this connection, we note that plaintiffs' complaint sought, inter alia, reformation of the Plan document and appointment of an independent administrator.

Section 1109(a) of ERISA provides specifically that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Section 1132(a) further provides that:

§1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

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[11]Apparently, Delgrosso contemplated a division of the surplus among vested and non-vested participants in the event that Spang was denied the surplus. In its brief, Delgrosso stated:

> Appellants believe that an administrator with no financial interest in the fund would, upon the Court's reformation of the Company's plan, distribute the excess assets in the fund equitably to Appellants and/or other participants.

Brief for Delgrosso at 42 n. 25.

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(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

[5] A federal court enforcing fiduciary obligations under ERISA is thus given broad equitable powers to implement its remedial decrees. Removal and replacement of a fund administrator under ERISA has been found appropriate where the administrator has been in substantial violation of his fiduciary duties. *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.), *cert. denied* ____ U.S. ____, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984). Similarly, reformation of a labor document to reflect accurately the intent of the negotiating parties has been held to be an appropriate remedy under section 301(a) of the LMRA, 29 U.S.C. §185(a). *West Coast Telephone Co. v. Local Union No. 77, I.B.E.W.*, 431 F.2d 1219 (9th Cir. 1970). See also *H. Prang Trucking Co. v. Local Union No. 469*, 613 F.2d 1235, 1239 (3d Cir. 1980).

[6] Since there is not the slightest ambiguity in the anti-reversion clause of the Pension Agreement, it is clear that reformation of the Spang Plan to bar reversion is appropriate. It is also evident from our discussion above that Spang committed a substantial breach of its fiduciary duty to the Fund participants by fashioning a Plan which, contrary to the express terms of the Pension Agreement agreed to by the parties, would result in a reversion of the

Fund assets to Spang rather than to the paricipants in the Fund for whose "exclusive benefit" the Fund must be managed. Since the Fund must now determine how to dispose of these excess assets, it is essential that an independent administrator be appointed to determine whether to terminate the Plan,[12] and to allocate the surplus assets among the appropriate participants. In light of the position taken by Spang in these proceedings, it is clear that Spang may not be charged with that task.

We note that ERISA specifically provides that the administrator perform the allocation of Fund assets upon termination. 29 U.S.C. §1344(a). We also observe that Labor Regulations provide specifically for the allocation to be performed upon termination of a plan that does not allow reversion of plan assets to the employer, as this one does not. These regulations provide for allocation according to the ratio of each participant's accrued benefits to the sum of all accrued benefits. 29 C.F.R. §2628.-32(a). Since this allocation would result in an increase in benefits payable to the vested, as well as the non-vested employees, the district court should appoint a representative for the

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[12]Spang contends in a supplemental letter brief that an independent administrator may not decide to terminate the plan, relying on a provision in the Spang Plan (section 12.1) to the effect that "The Company shall have the sole and absolute right to terminate the Plan." We note, however, that ERISA authorizes the plan administrator to terminate a plan. 29 U.S.C. §1341(a); see Employment Coordinator (RIA) ¶B-21, 120 (1985). An independent administrator thus need not follow an inconsistent plan provision to the contrary. 29 U.S.C. §1104(a)(1)(D). Nor does the administrator's authority to terminate unduly hamper the employer's freedom to decide whether or not to maintain a plan; nothing prevents the employer from terminating the plan if it desires to cease maintaining a plan or from creating a new plan if it desires to maintain a plan. In the circumstances of this case, where all plant locations covered by the plan have been closed, Spang's contention that it might wish to continue to maintain the plan is disingenuous.

vested participants to represent their interests in the selection of an independent administrator.

V.

We will affirm the entry of summary judgment on Counts I and II in favor of Spang because these counts essentially sought to have all surplus assets distributed to the non-vested participants such as Delgrosso. We have held in this opinion that the surplus assets may not revert to Spang nor are they available exclusively to Delgrosso. Thus the district court's rejection of these counts of Delgrosso's complaint is well taken.

Because we find that Spang could not implement a Plan which allows reversion of Fund assets to itself, and because we find that by doing so Spang breached its fiduciary duty under ERISA, we will reverse so much of the district court's order of August 29, 1984 as granted judgment to Spang on Counts III and IV and we will remand this case with the following directions. The district court, consistent with the foregoing opinion, is directed to: 1) grant summary judgment in favor of Delgrosso on Counts III and IV[13] 2) reform the Spang Plan to provide that reversion to Spang of the Fund surplus is barred; 3) appoint a representative for the vested participants to represent them in the selection of an independent Plan

[13]Count IV stated a cause of action under the Labor Management Relations Act §301(a), 29 U.S.C. §185(a). The district court entered judgment in favor of Spang based on Delgrosso's failure to exhaust contractual remedies, i.e., to arbitrate his claim. Since we have held that these claims were not within the arbitration clause of the Pension Agreement, see Part II, supra, summary judgment must be reversed. Delgrosso seeks no different relief under Count IV than he does under Count III, however, and having resolved in favor of Delgrosso the ERISA claims for reformation and appointment of an administrator, no other relief is available under Count IV.

administrator; and 4) under appropriate procedures, appoint an independent administrator of the Plan in the place of Spang.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Plaintiffs,

vs.

SPANG AND COMPANY,

Defendant.

Civil Action No. 82-2672

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs were employed at the Ferroslag Division Plant of defendant Spang and Company in Lorain, Ohio, until on or about July 20, 1982, at which time said plant was closed by defendant. This action, brought pursuant to the Employee Retirement Income Security Act (hereinafter referred to as "ERISA"), 29 U.S.C. §1001, *et. seq.*, and the Labor-Management Relations Act (hereinafter referred to

as "LMRA"), 29 U.S.C. §141, *et. seq.*, seeks certain pension benefits allegedly due the plaintiffs.[1] Plaintiffs' complaint[2] contains four counts.

In Count I, plaintiffs allege that the defendant and the United Steelworkers of America, which represented plaintiffs during their employment for defendant, entered into a collective bargaining agreement that was effective from August 1, 1980, through November 1, 1983. This agreement allegedly covered the terms and conditions of employment. A particular provision of that collective bargaining agreement provided that a previously drafted pension plan would continue in effect until November 1, 1983, as amended by a memorandum of agreement dated August 1, 1980. According to the complaint, the union and the defendant entered into a pension agreement as amended by the memorandum of agreement dated August 1, 1980, with the pension agreement being effective under the new collective bargaining agreement from November 1, 1980, through November 1, 1983. The pension agreement, which is attached to the complaint as an exhibit, provides that contributions made by the defendant to the pension fund may not revert to the defendant under any circumstances. Complaint, Exhibit B, §12.6, p. 25 (docket entry No. 5). The pension agreement further dictates the manner in

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[1]Plaintiffs allege that defendant is an employer engaged in interstate commerce, thereby making it subject to the requirements of both acts.

[2]Plaintiffs' original complaint was filed on December 13, 1982. On January 18, before any responsive pleading was filed (*see* Fed. R. Civ. P. 15(a)), plaintiffs amended their complaint as a matter of course. When the Court uses the term "complaint" in the text, it is actually referring to the amended complaint because an amended complaint, such as that filed by plaintiffs, that is complete in itself and that neither makes reference to nor adopts any position of the original complaint, serves to supersede the original complaint. *Lubin v. Chicago Title and Trust Co.*, 260 F.2d 411, 413 (7th Cir. 1958).

which the assets of the pension fund are to be distributed in the event of a plant shutdown. Specifically, the pension agreement sets up a priority of allocations for the distribution of said benefits. *See* Complaint, Exhibit B, ¶13.3, pp. 27-28 (docket entry No. 5). Count I goes on to assert that when the Lorain plant was closed on or about July 20, 1982, there was an excess of $100,000 in the pension fund beyond that needed to cover vested benefits, but defendant has allegedly not allocated the excess benefits for the benefit of the plaintiffs as it is obligated to do under the appropriate section of the pension plan. Based on these assertions, plaintiffs claim that the defendant has breached its fiduciary duty[3] under ERISA by not complying with the appropriate sections of the pension agreement.

Count II incorporates by reference all of the foregoing allegations and asserts that the defendant intends to hold the surplus money in the trust fund until the collective bargaining agreements expire. The plaintiffs argue that upon the expiration of the agreements, the defendant will argue that the surplus can be kept by the defendant for its own use and benefit. In Count II, plaintiffs aver that this conduct serves to violate the fiduciary mandates of ERISA, which require the fiduciary to discharge its duties solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries.

In Count III, plaintiffs assert that the pension agreement provides that the pension plan shall be amended so

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[3]Paragraph 2 of plaintiffs' complaint alleges that defendant "is an 'employer,' a 'party in interest,' a 'plan sponsor,' and 'administrator,' and a 'fiduciary' with respect to the Pension Agreement." (Docket entry No. 5).

as to be consistent with the pension agreement. The plaintiffs then assert that instead of amending the plan to make it consistent with the pension agreement, the defendant published a plan that seeks to retain surplus assets for the defendant's own behalf and avoid other relevant obligations imposed by the collective bargaining agreements. On this basis, the plaintiffs again assert a violation of ERISA's fiduciary responsibilities.

Finally, in Count IV, plaintiffs assert that by drafting the pension plan in a manner inconsistent with the collective bargaining and pension agreements, defendant has violated its contractual obligations under the LMRA.

Defendant has moved to dismiss the action on the following grounds: (1) that plaintiffs have failed to exhaust the agreed upon disputes procedure set forth in the agreements upon which they claim entitlement to relief; (2) that plaintiffs lack standing to assert the claims set forth in Counts I and II; and (3) that Counts I and II do not state a cause of action because ERISA does not provide a pretermination of pension fund right to surplus pension plan assets. Motion to dismiss (docket entry No. 17). For the reasons set forth below, the Court hereby denies defendant's motion.[4] In order to facilitate orderly discussion of the motion, the Court discusses each of defendant's arguments separately, and in detail, below.

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[4]The Court is cognizant of the fact that plaintiffs have filed a motion for summary judgment in this case, asserting that there is no question of material fact and that they are entitled to judgment as a matter of law because defendant has breached its fiduciary duty and because plaintiffs have a right to reformation of the contract. This opinion deals only with the motion to dismiss; the motion for summary judgment will be addressed at a later time.

I. FAILURE TO EXHAUST CONTRACTUAL REMEDIES

Defendant first argues that the case must be dismissed because plaintiffs have failed to exhaust the grievance and arbitration procedures provided for in the applicable agreements, which are a prerequisite to federal court jurisdiction under ERISA and the LMRA. As to the ERISA claims, defendant relies primarily upon the Third Circuit decision in *Adams v. Gould, Inc.*, 687 F.2d 27 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1777 (1983). In *Adams*, the defendant announced that it was terminating operations at one of its plants, and the union, after determining that the pension plan was actuarially insufficient to provide full benefit payments to all claimants and retirees, demanded that the defendant fully fund the plan. The defendant refused, and the union filed a grievance under the grievance procedure of the collective bargaining agreement. The arbitrator rejected the union's demand for full funding, but ordered that defendant recalculate its contributions so that the benefits could be increased. The plaintiffs, active employees whose pension benefits had vested, then brought an action in district court, alleging that the administrator of the plan had breached its fiduciary duty by refusing to pay benefits when due. Defendant moved for summary judgment on the ground that the plaintiffs were bound by the arbitration decision, but the district court held that the arbitration was not binding.

The district court then certified the following question for interlocutory appeal under 28 U.S.C. §1292(b): "Whether . . . plaintiffs . . . are bound by the results of an arbitration between their employer and their union and thereby barred from bringing their complaint in federal court." *Id.* at 28. The Third Circuit accepted the issue for

appeal and answered the question affirmatively, thereby reversing the district court. Specifically, the Third Circuit found that the defendant and the union had referred the matter to arbitration pursuant to a viable collective bargaining agreement, and, in making its decision, the Third Circuit relied on the national policy favoring arbitration of labor disputes. After finding that the arbitration provision of the applicable agreement covered the dispute in question, the Third Circuit found that "the plaintiffs in the district court were bound by the results of the arbitration . . . and, therefore, barred from bringing the action in district court." *Id.* at 33.

After a careful reading of the *Adams* decision, this Court finds that it is distinguishable from the case at hand and, therefore, not controlling. The dispute in *Adams* arose before the effective date of ERISA,[5] and there was no question as to whether defendant's conduct violated a federal statutory mandate such as the Court is confronted with in this action; therefore, the Court finds that *Adams* does not control the case before this Court. *But see Wilson v. Fischer and Porter Company Pension Plan*, 551 F.Supp. 593 (E.D. Pa. 1982). Alternatively, the Court looks to several other decisions which are dispositive of the issue at hand.

First, the Court looks to the District of Columbia Court of Appeals' opinion in *Airline Pilots Association, International v. Northwest Airlines, Inc.*, 627 F.2d 272 (1980). In that case, the union brought an action against the defendant airline for declaratory and monetary relief, asserting that the airline violated certain aspects of the

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[5]The dispute in *Adams* arose in 1973, and ERISA was not effective until January 1, 1975.

collectively bargained pension plan and also violated certain provisions of ERISA. The defendant moved to dismiss for lack of subject matter jurisdiction, claiming that, pursuant to the Railway Labor Act, 45 U.S.C. §151, *et. seq.*, the whole dispute had to be submitted to arbitration because it considered the interpretation and application of the collective bargaining agreement. The defendant also asserted that the compulsory arbitration requirements of the Railway Labor Act took precedence over that section of ERISA, which opens the district court to pension suits. The district court dismissed the entire action, and the Circuit Court affirmed the district court's dismissal of those claims relating to the application and interpretation of the pension plan, but reversed the district court with respect to those claims alleging violations of ERISA that were independent of the coverage and meaning of the pension plan. The District of Columbia Circuit specifically held that if paragraphs of the complaint can be read "as independently charging contravention of the obligatory fiduciary standards of ERISA," then a federal cause of action is stated, and the plaintiff need not exhaust the arbitration requirements. *Airline Pilots Association*, 627 F.2d at 277. *See Lewis v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 431 F.Supp. 271 (E.D. Pa. 1977) (agreements to arbitrate ERISA claims invalid).

Here, plaintiffs' ERISA counts (Counts I through III) allege violations of ERISA's fiduciary standards. Specifically, those counts assert claims under 29 U.S.C. §1104(a)(1)(A)[6] (that a fiduciary discharge his duties solely

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[6]Title 29 U.S.C. §1104(a)(1)(A) provides as follows: "(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and — (A) for the exclusive purpose of:

(Continued on next page)

in the interest of the participants and beneficiaries for the purpose of providing benefits to the participants and beneficiaries) and §1104(a)(1)(D)[7] (that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries in accordance with the documents and instruments governing the plan). Construing plaintiffs' complaint in a liberal fashion and most favorably to the plaintiffs[8] (*see Airline Pilots Association*, 627 F.2d at 277), the Court finds that the first three counts of the complaint should be read as independently charging contravention of the obligatory fiduciary standards of ERISA, and, therefore, those counts are not subject to arbitration.

Moreover, two United States Supreme Court decisions, *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973), also support the position that exhaustion of arbitration provisions under a collective bargaining agreement are not a necessary prerequisite to a federal court action when a federal statutory right is involved. *See also Gavalik v. Continental Can Co.*, Civil Action No. 81-1519 (W.D. Pa. March 26, 1982). In *Alexander*, the

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(Continued)

(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."

[7]Title 29 U.S.C. §1104(a)(1)(D) provides as follows: "(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and — *** (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this chapter."

[8]In reviewing a motion to dismiss, the Court must construe the pleadings liberally and most favorably to the non-moving party, in this case the plaintiffs. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Supreme Court held that an individual's right to equal employment opportunity under Title VII was independent of an employee's non-discrimination rights under a collective bargaining agreement and that an employee's initial resort to the grievance procedure did not preclude a later court action.[9] The Court went on to note the specific problems with submitting a statutory dispute to an arbitrator. Foremost among those problems, according to the Supreme Court, is the fact that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[10] 415 U.S. at 57. "Moreover, the factfinding process in arbitration usually is not equivalent to judicial findings"; that is, the record of an arbitration proceeding is not as complete as that of a court proceeding, the rules of evidence do not apply, and the right to discovery is severely limited. *Id.*

Likewise, in *Barrentine*, the Supreme Court concluded that an employee's right to minimum wages under the Fair Labor Standards Act, 29 U.S.C. §201, *et. seq.*, was independent of his right to collectively bargain for wages.[11] Thus, according to *Barrentine*, a court can entertain an independent action pursuant to the Fair Labor Standards Act, even after a grievance has been filed and processed. In this respect, the Supreme Court specifically stated:

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[9]Even though the *Alexander* case involved Title VII claims, the Court believes that the basic principle for which the case is cited applies here. *Airline Pilots Association*, 627 F.2d at 277.

[10]The Supreme Court emphasized that the resolution of statutory or constitutional issues is a primary responsibility of the courts.

[11]Like its position on *Alexander*, the Court finds the *Barrentine* rationale applicable here even though that case involved a Fair Labor Standards Act claim.

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitrable decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute . . . .

The Court acknowledges that it can be argued here that plaintiffs' claims arise primarily from the very agreements which contain the arbitration and grievance provision. However, the Court must construe the complaint most favorably to the non-moving party, and the complaint specifically claims federal statutory violations. Therefore, the Court finds that the issues are not subject to arbitration,[12] but the Court also notes that it will restrict plaintiffs to proving the federal statutory violations at trial and not permit them to prevail on mere contractual violations.

As to the LMRA claim (Count IV), the Court also finds that this claim is not barred by plaintiffs' failure to exhaust the arbitration and grievance procedures. Defendant cites the Court to the United States Supreme Court decisions of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965), and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593

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[12]The Court adds one final ground for holding that the claim in Count III—that the defendant violated its fiduciary duty by not drafting a plan that is consistent with the agreement—should not be referred to arbitration. The Court finds that the claim in Count III does not fall within the purview of the arbitration provision. *See* Complaint, Exhibit B, §11.2, p. 23 (docket entry No. 5).

(1960), claiming that these three cases require that plaintiffs must exhaust their contractual remedies before bringing an action in federal court under the LMRA. The Court again rejects defendant's argument because the three Supreme Court cases cited above all involved situations in which a party was asserting a contractual right arising out of a collective bargaining agreement, rather than a violation of a federal statutory mandate. Count IV asserts a violation of a specific statutory mandate and is, thus, controlled by the *Alexander* and *Barrentine* decisions discussed *infra*. Since plaintiffs' claim in Count IV is based on rights arising out of a statute,[13] it is not subject to arbitration.[14]

II. STANDING

Defendant next moves to dismiss Counts I and II of the complaint on the basis that plaintiffs lack standing to assert the claims contained therein. In support of this motion, defendant first cites the Court to §13.3 of the pension agreement, which provides as follows:

> In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:

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[13]The Court again adds that plaintiffs will be required to prove the right under the statute and will not be permitted to prevail on the basis of breach of contract.

[14]As an alternative basis for this holding, the Court finds that the claim asserted in Count IV is not of the type contemplated by the arbitration provision of the agreement. *See* footnote 12, *supra*.

(a) The reserves applicable to those Participants who have been transferred to other locations.

(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.

(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.

(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

For the purpose of this partial termination Section, those Participants who are on layoff and if recalled would not have a break in Continuous Service for pension purposes will be considered as active Participants for the allocation under (d) above.

Complaint, Exhibit B, ¶13.3, pp. 27-28 (docket entry No. 5). After citing this section, the defendant then asserts that plaintiffs lack standing to assert the claims contained in Counts I and II because they fall within subparagraph (c), rather than subparagraph (d), of §13.3; that is, the defendant argues that with the shutdown of the Lorain Plant, reserves were allocated to each plaintiff to provide the defined benefit to which he was entitled under the pension agreement on the basis of his years of service within the plant, but which he was not entitled to receive because he had not satisfied the age requirement, which causes the plaintiffs to fall within subparagraph (c), rather than subparagraph (d)—the basis for Counts I and II.

The Court rejects this argument because, as plaintiffs correctly state, defendant is actually arguing the merits of the case under the guise of a standing argument. As the

Supreme Court has stated, the issue of standing is "whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). In order to meet the standing test, a plaintiff must assert more than a generalized grievance, or rights, of third parties; he must assert his own legal rights based on an actual or concrete injury. *See Valley Forge College v. Americans United for Separate of Church and State, Inc.*, 454 U.S. 464, 469, 471-472 (1982). The Court believes that plaintiffs' complaint does meet the standing requirements as discussed in the above United States Supreme Court cases.

III. PRE-TERMINATION RIGHT TO PENSION FUND SURPLUS

Defendant finally argues that Counts I and II of the complaint should be dismissed because the Third Circuit has stated, in *Van Orman v. American Insurance Co.*, 680 F.2d 301 (1982), that there is no right to the actuarial surplus in a trust fund prior to the termination of the underlying pension plan. Specifically, defendant argues that it has not terminated the trust fund containing the surplus alleged to be present in Counts I and II; therefore, based on the *Van Orman* case, the plaintiffs have no right to the surplus at this point. In *Van Orman*, the participants in the pension plan brought suit in district court against the employer, the successor pension plan, and others seeking entitlement to the actuarial surplus in the plan. The plan was funded by contributions from both the participants and the employer. The Court acknowledges that the *Van Orman* Court held that there was no right to surplus assets prior to termination of the pension fund; however, that case is clearly distinguishable from the case at hand.

In *Van Orman*, the underlying contract did not afford plaintiffs any pre-termination right to the surplus and, in fact, expressly stated that the employees had no rights to the fund other than those provided in the contract.[15] 680 F.2d at 312. Thus, the Court was actually dealing with the question of whether there is a pre-termination right to surplus benefits, aside from any contractual provisions, under ERISA, based on an unjust enrichment theory. The Court found that ERISA does not provide such a pre-termination right to the surplus, nor is the right necessary to effectuate any statutory policy. *Id.* at 313. On this basis, the Court found no pre-termination right.

In this case, on the other hand, the pension agreement specifically provides a contractual right to surplus benefits when a plant is permanently shutdown. At §13.3 of the pension agreement, the plan provides for the allocation of surplus benefits upon the shutdown of a plant, and that section specifically states that surplus assets are to be pro-rated among the remaining participants in relation to each participant's established seniority to the total seniority of all participants for whom distribution is to be made. Complaint, Exhibit B, §13.3(d), p. 28 (docket entry No. 5). Thus, an underlying contractual provision[16] is present in this case, and the plaintiffs stand on solid ground in alleging an ERISA violation based upon an underlying contractual agreement in which the employer has contractually obligated itself to provide certain benefits. *See Van*

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[15]The Third Circuit, citing *Murphy v. Heppenstall Co.*, 635 F.2d 233, 239 (3d Cir. 1980), *cert. denied*, 454 U.S. 1182 (1982), specifically stated that the inquiry in *Van Orman* differs from a case in which a party seeks to enforce a contractual right.

[16]It must be noted that §13.3 of the pension agreement, set forth in Section II *supra*, provides for distribution of the plan assets upon shutdown of the plant and not upon termination of the pension fund.

Orman, 680 F.2d at 312; *Murphy v. Heppenstall Co.*, 635 F.2d 233, 239 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982).[17]

An appropriate Order will be issued.

Date: 9/29/83

/s/ ALAN N. BLOCH
United States District Judge

cc: Counsel of record.

[17] In *Murphy*, the Third Circuit stated that "[i]t is not inconsistent with the statutory scheme [of ERISA] to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself." 635 F.2d at 239.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Plaintiffs,

vs.

SPANG AND COMPANY,

Defendant.

Civil Action No. 82-2672

ORDER

AND NOW, this 29th day of September, 1983, upon consideration of Defendant's Motion to Dismiss filed in the above captioned matter on June 28, 1983,

IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ ALAN N. BLOCH
United States District Judge

cc: Daniel P. McIntyre and Joy E. Klopp, Esquires
Five Gateway Center, Pittsburgh, PA 15222.

William T. Marsh, Esquire
P.O. Box 751, Butler, PA 16001.

Henry J. Wallace, Jr., and Robert F. Prorok, Esquires
747 Union Trust Building, Pittsburgh, PA 15219.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Plaintiffs,

vs.

SPANG AND COMPANY,

Defendant.

Civil Action No. 82-2672

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs are former employees of the Ferroslag Division of defendant Spang and Company's plant which was located in Lorain, Ohio. Defendant closed the Lorain plant on July 20, 1982, and plaintiffs' employment terminated at that time. Through this action, brought pursuant to the Employee Retirement Income Security Act (hereinafter referred to as "ERISA"), 29 U.S.C. §1001, *et. seq.*, and the Labor-Management Relations Act (hereinafter referred to

as "LMRA"), 29 U.S.C. §141, *et. seq.*,[1] plaintiffs seek certain pension benefits allegedly due them as a result of the plant closing.

The pertinent operative facts are as follows. The defendant and the United Steelworkers of America, which represented plaintiffs during their employment for defendant, entered into a collective bargaining agreement that was effective from August 1, 1980 through November 1, 1983. The agreement provided that "[t]he Pension Plan Agreement, effective November 1, 1977, shall continue in effect until November 1, 1983 and as amended per the Memorandum of Agreement dated August 1, 1980." Complaint, Exhibit A, p. 33 (docket entry No. 1). The pension plan agreement (hereinafter referred to as the "agreement") addressed the issues of reversion of contributions to the defendant and distribution of assets upon plant shutdown in the following manner:

> 12.6. The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement.
>
> * * *

[1]Plaintiffs allege that defendant is an employer engaged in interstate commerce, thereby making it subject to the requirements of both acts. Amended complaint ¶2 (docket entry No. 5).

13. In the event a plant is permanently shut down or a plant is relocated outside the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:

(a) The reserves applicable to those Participants who have been transferred to other locations.
(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.
(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.
(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

Complaint, Exhibit B, pp. 27-28 (docket entry No. 1).

One other document is also involved here. To comply with the dictates of ERISA, the defendant drafted a pension plan[2] (hereinafter referred to as the "plan"), which provided, in pertinent part, as follows:

It . . . became necessary, in order to comply with ERISA, to establish a separate legal entity, the Pension Plan. During the period of time that there is in effect a collective bargaining agreement which specifically deals with pensions as to those employees that the Union represents . . . the said Pension Plan shall be

[2]*See* 29 U.S.C. §1102, which requires a written plan.

> construed in a manner consistent with those provisions as are provided for in any such collective bargaining agreement or any pension agreement addendum thereto during their term. The terms of such agreements shall not be deemed to establish a pension benefit or rights outside of this Pension Plan. . . .

Complaint, Exhibit D, pp. ii-iii (docket entry No. 1). The plan also addressed the distribution of assets in the event of plant shutdown, and its provisions on this subject are virtually identical to those contained in the agreement with the exception of the provision governing distribution to the remaining participants (12.2[4]), which provides as follows:

> [4] The remaining assets, *if insufficient to provide for all remaining accrued benefits,* will, if permitted by law, be prorated among the remaining Participants in relationship to each Participant's established seniority to the total seniority of all remaining Participants for whom allocation is to be made under this subparagraph [4].

Complaint, Exhibit D, p. 53 (docket entry No. 1) (emphasis added). The plan further addressed the issue of reversion of assets to the employer, as follows:

> (e) To the extent there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.

Complaint, Exhibit D, p. 59 (docket entry No. 1).

On the basis of these facts, plaintiffs, who did not qualify for vested benefits at the time of plant shutdown,

assert violations of ERISA and the LMRA. Specifically, plaintiffs' complaint asserts four counts as follows: (1) in Count I, plaintiffs assert that, upon plant closing, over $100,000 remained in the pension fund beyond the sum needed to cover vested benefits and that defendant has not allocated all excess benefits to the plaintiffs as required by 13.3 of the agreement, thereby breaching its fiduciary obligation[3] under ERISA; (2) in Count II, plaintiffs assert that defendant intends to retain the surplus in the fund upon expiration of the agreement, thereby violating its ERISA fiduciary obligation to discharge its duties solely in the interest of the participants and beneficiaries; (3) in Count III, plaintiffs assert that defendant's conduct in drafting a plan that was inconsistent with the agreement violates ERISA's fiduciary mandates; and (4) in Count IV, plaintiffs assert that, by drafting the plan in a manner inconsistent with the collective bargaining agreement and the agreement, defendant has violated its contractual obligations under the LMRA. In sum, plaintiffs argue that the agreement controls in this case and that, since the agreement provides for distribution to the remaining participants, they are entitled to the entire surplus, in the form of annuity benefits,[4] in accordance with 13.3 of the agreement.

Defendant counters plaintiffs' assertions by arguing that the proper interpretation of the agreement and plan is

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[3]Paragraph 2 of plaintiffs' complaint asserts that defendant is a "fiduciary" with respect to the agreement (docket entry No. 5), and defendant does not contest this position.

[4]At the pretrial conference in this case, plaintiffs informed the Court and the defendant that they are not seeking a lump-sum payment here, but rather request that the surplus be used to purchase annuities to be paid to the plaintiffs at the time that each reaches the age of 65.

that plaintiffs are entitled to that share of the surplus sufficient to provide a deferred vested pension benefit based upon their actual length of service, rather than to the entire surplus. Moreover, defendant contends that the provisions of the plan clearly embody the true intentions of the parties and that it was never intended that plaintiffs should receive a windfall such as they claim here.

The Court held a pretrial conference in this case, and at that conference, the parties informed the Court that the case, or at least a large portion of it, could be decided on cross motions for summary judgment. Thus, the Court ordered that appropriate motions and briefs be filed and refrained from placing this case on its trial list pending resolution of the cross motions. Both parties filed motions and briefs, but both sides raised only the ERISA claims (Counts I-III) in their briefs and did not raise the LMRA claim (Count IV).[5] Accordingly, the Court treats the motions as ones for partial summary judgment and does not rule on the LMRA claim. As to the ERISA claims, the Court hereby grants defendant's motion for partial summary judgment and denies plaintiffs' motion.

Before addressing the merits of the motions, the Court deems it appropriate to review the law governing a court's review of a motion for summary judgment. Summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no

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[5]At page 42 of its brief, defendant argues that plaintiffs make no reference to the LMRA claim in either their motion or brief and, therefore, have presumably dropped it. On this basis, defendant contends that it is entitled to summary judgment on that claim. The Court rejects this argument because defendant bears the burden on its summary judgment motion, and since it has provided no authority for dismissal of this claim, it is not entitled to summary judgment.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Third Circuit has succinctly stated that summary judgment is warranted only upon a clear showing that no genuine issue of fact exists and that the law clearly favors summary judgment based on those facts. *Ely v. Halls Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir. 1978). All inferences, doubts, and issues of credibility must be resolved in favor of the non-moving party. *Id.* These statements guide the Court in its review of the motions here.

The Court first addresses defendant's contention that plaintiffs' claims are barred by this Court's opinion of September 29, 1983, regarding defendant's motion to dismiss. It is appropriate to address this contention first because, although the Court rejects this contention, a discussion of the same will provide necessary groundwork for the Court's reasoning on defendant's successful contentions. In its motion to dismiss, defendant argued, on the basis of *Adams v. Gould*, 687 F.2d 27 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1777 (1983), that the case must be dismissed because this Court did not have jurisdiction due to plaintiffs' failure to exhaust the grievance and arbitration procedures provided for in the applicable agreements. On the basis of *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973); and *Airline Pilots Association International v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980), the Court held that it did have jurisdiction and that plaintiffs did not have to exhaust the grievance and arbitration procedures because plaintiffs' claims arise out of, and assert violations of, federal statutory mandates. Defendant now asserts that because the Court is confronted with a motion for summary judgment rather than a motion to

dismiss, the Court need not construe the pleadings most favorably to the plaintiffs. Instead, the defendant argues that the Court may pierce the allegations of the pleadings (6 Moore's Federal Practice ¶56.04[1], p 56-64), and, according to the defendant, if the Court pierces the pleadings in this case, it will find that plaintiffs' claims are purely contractual ones that require arbitration. The Court rejects this argument and adheres to its holding and reasoning on this issue in its opinion and order on the motion to dismiss. However, as it did in its opinion on the motion to dismiss, the Court emphasizes that it will restrict plaintiffs to proving federal statutory violations and will not permit them to prevail on a mere breach of contract argument. *DelGrosso, et. al. v. Spang and Company*, C.A. 82-2672, p. 8 (W.D. Pa. opinion and order of 9/29/83).

The Court now turns its attention to the contentions of both parties on the merits of plaintiffs' ERISA claims. In Count I, plaintiffs contend that by refusing to comply with 13.3 of the agreement and to allocate all excess benefits to plaintiffs, defendant breached its fiduciary duty under ERISA. Specifically, plaintiffs claim a breach of 29 U.S.C. §1104(a)(1)(D), which provides as follows:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
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> * * *
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

According to the plaintiffs, the defendant, by failing to apply the surplus to the benefit of plaintiffs, has failed to discharge its fiduciary duty of acting in accordance with the agreement governing the plan. Defendant opposes plaintiffs' position, arguing that 13.3 does not require that the entire surplus be earmarked for plaintiffs, rather, according to defendant, 13.3 requires only that defendant provide pension benefits for plaintiffs in accordance with the years of service that each plaintiff accrued. Defendant contends that since 13.3 must be interpreted in this fashion and since it (defendant) is prepared to provide a deferred vested pension to each plaintiff in accordance with his years of actual service, it has not violated its fiduciary duty of discharging its duties in accordance with the agreement. The Court agrees with defendant.

The language of 13.3 did not enlighten the Court as to which party was correct; thus, it looked to the history behind 13.3(d) and read the agreement as a whole. *See In re C. D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1132 (E.D. Pa. 1977), *aff'd. without opinion*, 582 F.2d 1273 (3d Cir. 1978). Paragraph 13.3 of the agreement was the result of labor negotiations between defendant and the union representing the plaintiffs and other employees. By letter of July 2, 1969, a representative of the union drafted a letter to an assistant vice-president of defendant, requesting, inter alia, that defendant consider an addition to the agreement which would provide for pension benefits for employees who would be terminated, for any reason, after ten-years' service. Marsh affidavit, Exhibit 3, p. 1 (docket entry No. 56). Counsel representing defendant met with the union representative and prepared a memo, to defendant's director of industrial relations, concerning this meeting. This memo stated that the real issue of concern in

the request for pension benefits after ten-years' service was the need for a form of vesting in the event of a permanent facility shutdown and proceeded to recommend, to the director of industrial relations, that the defendant offer a form of vesting based on the years of service involved as a response to this concern. Marsh affidavit, Exhibit 5, pp. 2-3 (docket entry No. 56). In turn, by letter of February 5, 1970, defendant proposed a provision, with regard to plant shutdown, that contained essentially the same language as 13.3. Marsh affidavit, Exhibit 4, p. 2 (docket entry No. 56). This history coupled with the elaborate scheme for distribution upon plant shutdown that provides for distribution to the remaining participants only after all other liabilities have been satisfied (Complaint, Exhibit B, pp. 27-28 (docket entry No. 1)), with the fact that distribution of the entire surplus to plaintiffs would permit plaintiffs to receive extraordinarily large monthly benefits when compared with those who had many more years of service and were vested under the other terms of the agreement (Rackley affidavit and Exhibits A-D attached thereto (docket entry No. 58)), and with a reading of the agreement as a whole leads the Court to the conclusion that the parties intended to provide benefits for the remaining, unvested participants on a prorata basis, with each participant's benefits limited to his years of actual service, and did not contemplate such an excess due to overfunding. Thus, the Court finds that defendant's interpretation of 13.3 is correct. Accordingly, the Court finds that defendant does act in accordance with the agreement by providing deferred vested pension benefits to plaintiffs based on their years of actual service, rather than on the basis of the amount of the surplus, and, therefore, does not violate its fiduciary obligation under 29 U.S.C. §1104(a)(1)(D).

Plaintiffs' second claim is that by holding the surplus in the fund until the collective bargaining agreement and agreement expire, thereby hoping to retain it for its own benefit, defendant violates its fiduciary obligation under 29 U.S.C. §1104(a)(1)(A)(i), which provides as follows:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries;. . . .

In sum, plaintiffs claim that, as a matter of law, defendant's retention of the surplus would violate this section, and, needless to say, defendant's argue against plaintiffs' position.

The Court finds no merit in plaintiffs' claim. As a basis for this decision, the Court looks to several different sources. First, the Court turns to the ERISA statutory provisions, specifically to 29 U.S.C. §1344(d)(1) which provides as follows:

> (d)(1) Any residual assets of a plan may be distributed to the employer if—
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

All three requirements are present here in that all liabilities have been met,[6] the distribution is not alleged to contravene any provision of law,[7] and the plan provides for distribution to defendant.[8] *See* complaint, Exhibit D, p. 59 (docket entry No. 1). Thus, ERISA, itself, permits reversion to the defendant. It must be noted that §1104 provides that it is subject to §1134; therefore, the fulfillment of the requirements under §1344 creates an exception to §1104 here.[9]

Moreover, in enacting ERISA, Congress intended to federalize the common law of trusts. *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979). *See* 93d Cong., 2d. Sess., U.S. Code Cong. & Ad. News, pp. 4639, 5186 (remarks of Senator Harrison Williams).[10] The common law of trusts permitted the employer to recapture surplus assets. *See Pollock v. Castrovinci*, 476 F. Supp. 606, 612 (S.D.N.Y. 1979), *aff'd. without opinion*, 622 F.2d 575 (2d Cir. 1980) (prior to ERISA there was no problem in recapturing surplus assets).

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[6]Of course, this discussion incorporates the discussion of the previous section and assumes that defendant is providing benefits to the plaintiffs on the basis of their actual years of service, thereby satisfying that liability.

[7]The Court acknowledges that plaintiffs assert that the distribution contravenes 29 U.S.C. §1104(d)(1)(A)(i), but the Court rejects that argument here.

[8]It may be argued that the plan does not properly provide for reversion because it is inconsistent with the agreement, but as will be discussed *infra*, that argument lacks merit.

[9]The Court once again emphasizes that plaintiffs have invoked this Courts' jurisdiction on the basis of a violation of a federal statutory mandate, and the Court holds plaintiffs to proving such a violation and will not permit them to prevail on some other theory.

[10]Senator Williams stated that the objective of ERISA's fiduciary provision is "to make applicable the law of trusts."

Finally, the policies underlying the enactment of ERISA support an employer's claim to a surplus. As the *Moyer* Court stated,

> Employers will continue to fund their plan under ERISA guidelines, but will not be penalized for overfunding "in an abundance of caution" or as a result of a miscalculation on the part of the actuary. Thus, employees will continue to be protected to the extent of their specific benefits but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis.

441 F. Supp. at 1132-33. On the basis of these statutory provisions and case precedents,[11] the Court finds no breach of §1104(a)(1)(A)(i) by defendant's retention of the surplus.

Plaintiffs' third and final ERISA claim is that defendant included certain provisions in the plan that were inconsistent with the agreement, thereby violating its fiduciary obligation under §1104. Specifically, plaintiffs assert, on the basis of 12.6 and 13.3(d) of the agreement, that the agreement requires proration of all surplus funds for the benefit of the participants in the event of plant shutdown; however, the plan, at 12.2[4], provides for proration of remaining fund assets only if the funds are insufficient to provide for all accrued benefits. Plaintiffs further assert that 12.6 of the agreement prohibits reversion of the surplus fund; whereas, 12.3 of the plan provides for reversion

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[11]One additional reason that provides indirect support is the provisions of the Internal Revenue Code and supplementing regulations, 26 U.S.C. §401(a)(2) and 26 C.F.R. §1.401-2(b), that permit an employer to recover residual assets, which result from actuarial error, without sacrificing favorable tax treatment. *See Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 260 (D.C. 1983).

of surplus assets to the defendant.[12] Although plaintiffs do not cite that specific portion of §1104 that is allegedly violated, it is apparent that they rely upon §1104(a)(1)(D) that requires a fiduciary to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA. Defendant opposes plaintiffs' claims by asserting that the plan is consistent with the agreement and, more importantly, with ERISA.

Plaintiffs' first contention—that the plan is inconsistent with the agreement because it provides for proration of remaining fund assets only if the funds are insufficient to provide for all accrued benefits—can be disposed of on the basis of this Court's discussion of plaintiff's first ERISA claim. As the Court determined in that discussion, the true purpose and intention behind 13.3 of the agreement was to provide for those employees who were vested at the time of plant shutdown and then, after those liabilities were satisfied, to provide for pension benefits to the remaining participants in accordance with their actual years of service on a prorata basis of the funds available. Paragraph 12.2[4]

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[12]This third count also asserts other claims that do not directly bear upon the distribution of assets; that is, plaintiffs claim that a collectively bargained insurance agreement (*see* complaint, Exhibit C (docket entry No. 1)) obligates the defendant to pay for retirees' medical benefits, yet the plan includes a provision that provides for retirees' medical benefits to be paid from the pension fund and that the defendant set up an intermediary to administer the plan, yet the agreement charges the defendant with responsibility for administering the plan. Amended complaint p. 11 (docket entry No. 5). However, plaintiffs do not raise these issues in their brief, they merely raise the issues dealing with their right to the surplus, which the Court perceives to be the heart and essence of all three of the ERISA counts. Accordingly, the Court will proceed to decide the cross motions on Count III on the basis of those matters raised in the motions and briefs.

of the plan is in keeping with that purpose and intention and is, therefore, not inconsistent with the agreement.

The real heart of plaintiffs' third ERISA claim is found in its contention that the plan is inconsistent with the agreement to the extent that it provides for reversion of surplus assets to the defendant. In opposition to plaintiffs' contention, defendant cites the Court to the cases of *In re C. D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd. without opinion*, 582 F.2d 1273 (3d Cir. 1978) and *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Company*, 555 F. Supp. 257 (D.C. 1983). The Court finds those cases to be on point and persuasive and grants summary judgment in favor of defendant on this third count on the basis of said cases.

Moyer was also a suit by employees to recover surplus plan assets. The original plan in *Moyer* allowed the employer to alter, amend, or revoke the pension agreement. However, the employer's ability to alter, amend, or revoke was limited by a provision that prohibited alteration, amendment, or revocation for the purpose of permitting the trust corpus or income to revert to the employer. Shortly before the plan terminated, the employer amended the plan to provide for reversion to it of surplus due to actuarial computation. The Court upheld the validity of the amendment and permitted reversion to the employer, emphasizing that §1344(d)(1)[13] explicitly permits such reversion. Specifically, the *Moyer* Court noted that it was necessary to insure payment of the plan's obligations to the participants, but after those obligations were met, the employer was entitled to the surplus. As to the challenged amendment to the plan, the Court upheld its validity, stating that it "include[d]the language necessary to reserve the

[13]*See* discussion of this section in text *supra*.

employer's right to the remaining assets as required . . ." under §1344(d)(1)(C). 441 F. Supp. at 1132.

In *Washington Star*, two documents—a pension plan and a trust agreement—governed the pension fund, which contained a four million dollar surplus. The trust agreement was amended in 1976 to provide that the trust fund would be used for the exclusive benefit of the employees and that no part of the fund would be returned to the employer. In 1981, the employer announced that it would cease operations and simultaneously amended the trust agreement to provide for reversion of all surplus assets. The former employees and several local unions brought suit, charging that the unilateral amendment was a breach of fiduciary duty under ERISA.[14] The Court, relying on *Moyer* and §1344(d)(1), upheld the amendment. 555 F. Supp. at 262.

These two cases are very akin to the case at hand. Here, the agreement prohibited reversion of surplus assets to the defendant. In 1981, defendant drafted the plan to comply with ERISA and backdated the plan to 1976. Marsh deposition, pp. 8-9 (docket entry No. 50). The plan provided for reversion of surplus assets. Defendant ceased operation at its Lorain plant in 1982. The holdings in *Moyer* and *Washington Star* provide that such a reversionary provision enacted during the life of the plan is valid. Moreover, it must again be emphasized that the provision that plaintiffs rely upon as a basis for the third count (§1104) specifies, first, that it is subject to §1344 which permits reversion, and, second, that a fiduciary need only discharge his duties in accordance with the documents and instruments governing the plan to the extent that such

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[14]Please note that the exact same claim is alleged by plaintiffs here.

documents and instruments are consistent with the provisions of ERISA. 29 U.S.C. §1104(a)(1)(D). Since ERISA specifically provides for reversion if the plan so requires, it appears logical for an employer to incorporate such a reversionary provision in the plan to comply with ERISA.[15]

Before terminating its discussion on this third count, the Court deems it appropriate to discuss and distinguish one case cited by the plaintiffs as a basis for precluding defendant from amending the plan. In *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513 (4th Cir. 1980), an employer sought a declaratory judgment to validate its proposed distribution, to itself, of excess funds in a terminated pension benefit plan. The pension agreement in *Audio Fidelity* provided that, upon plan termination, any excess assets would be distributed to the participants. The employer amended the plan to provide for reversion, but the amendment did not occur until after the plan was terminated. The Court held the amendment to be invalid, stating as follows:

> On the date of termination, Audio no longer was obligated to make contributions, and the participants no longer were entitled to accrue additional benefits. The rights of both parties became fixed, and substantive modifications to the plan altering these rights were precluded . . . . The scheme established by ERISA relies upon the provisions of each plan at the time of termination. It would defeat congressional intent and

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[15]The defendant, citing *Local 1574, I.L.M. v. Gulf & Western Mfg. Co.*, 417 F. Supp. 191 (D. Maine 1976), argues that if the plan conflicts with the agreement, the agreement controls, but this argument again ignores the fact that plaintiffs have asserted breaches of ERISA's fiduciary duties and the crucial factor is whether defendant has complied with ERISA's requirements, which defendant has done in this case.

> render . . . *1344(d)(1)* nugatory if retroactive amendments after termination could alter substantive rights of the pension plan.

Id. at 517 (emphasis added).[16] As one court in this Circuit has stated, "the crucial factor . . . influencing the [*Audio Fidelity*] [C]ourt was that the challenged amendment occurred after the plan's termination." *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 96 F.R.D. 632, 646 (D.N.J.), *aff'd.*, 726 F.2d 956 (3d Cir. 1983) (Third Circuit found district court's interpretation of *Audio Fidelity* to be reasonable at p. 966). The Court agrees with the *Walsh* Court's interpretation and, since the amendment in this case occurred during the life of the plan, the Court distinguishes *Audio Fidelity* on the same basis here.

In sum, plaintiffs have predicated their ERISA claims on defendant's alleged violations of ERISA's fiduciary standards contained in §1104; however, their proof on these claims has been more in the nature of breach of contract theories. The defendant has cited the Court to the appropriate material in the record, statutory provisions, and case authority to support its position that it has, indeed, complied with §1104 in all respects. Accordingly, the Court grants partial summary judgment in favor of defendant on Counts I through III.

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[16]This statement gives the impression that the Court would have upheld the amendment if made before plan termination.

An appropriate Order will be issued.

Date: June 1, 1984

/s/ ALAN N. BLOCH
United States District Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Plaintiffs,

vs.

SPANG AND COMPANY,

Defendant.

Civil Action No. 82-2672

ORDER

AND NOW, this 1st day of June, 1984, upon consideration of Plaintiffs' Motion for Summary Judgment filed in the above captioned matter on August 11, 1983, which this Court treats as a Motion for Partial Summary Judgment, IT IS HEREBY ORDERED that said Motion is DENIED.

AND, FURTHER, upon consideration of Defendant's Motion for Summary Judgment filed in the above captioned matter on October 11, 1983, which this Court treats as a Motion for Partial Summary Judgment, IT IS

HEREBY ORDERED that said Motion is GRANTED and that Counts I, II, and III of plaintiffs' complaint are hereby dismissed.

/s/ ALAN N. BLOCH
United States District Judge

cc: Daniel P. McIntyre and Joy E. Klopp, Esquires
Five Gateway Center, Pittsburgh, PA 15222.

William T. Marsh, Esquire
P.O. Box 751, Butler, PA 16001.

Henry J. Wallace, Jr., and Robert F. Prorok, Esquires
747 Union Trust Building, Pittsburgh, PA 15219.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, et al.,
Plaintiffs,
vs.
SPANG AND COMPANY,
Defendant.

Civil Action No. 82-2672

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs are former employees of the Ferroslag Division of defendant Spang and Company's plant, which was located in Lorain, Ohio. Defendant closed the Lorain plant on July 20, 1982, and plaintiffs' employment terminated at that time. Plaintiffs initiated this action under the Employee Retirement Income Security Act (hereinafter referred to as "ERISA"), 29 U.S.C. §1001, *et. seq.*, and the Labor-Management Relations Act (hereinafter referred to as "LMRA"), 29 U.S.C. §141, *et. seq.* By opinion and order of June 1, 1984, the Court granted summary judgment in favor of defendant of the ERISA claims (Counts I—III of the complaint). The parties now have filed cross motions for summary judgment on the only remaining count, the LMRA claim (Count IV).[1] For the reasons set forth below,

[1]At the pretrial conference, the parties informed the Court that the case could be decided on cross motions for summary judgment. Accordingly, the Court ordered that appropriate motions and briefs be filed. Both sides filed motions and briefs, but neither side moved for summary judgment on, or briefed, the LMRA claim. After the Court granted

(Continued on next page)

the Court grants summary judgment in favor of defendant on the remaining claim.

The pertinent operative facts are as follows. The defendant and the United Steelworkers of America, which represented plaintiffs during their employment for defendant, entered into a collective bargaining agreement that was effective from August 1, 1980 through November 1, 1983. That agreement provided that "[t]he Pension Plan Agreement [(hereinafter referred to as "the agreement")], effective November 1, 1977, shall continue in effect until November 1, 1983 and as amended per the Memorandum of Agreement dated August 1, 1980." Complaint, Exhibit A, p. 33 (docket entry No. 1). The agreement addressed the issues of reversion of contributions to the defendant and distribution of assets upon plant shutdown in the following manner:

> 12.6. The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement.
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> * * *

(Continued)

partial summary judgment on the ERISA claims, the Court contacted plaintiffs' counsel to ascertain if the LMRA claim had been withdrawn. Plaintiffs' counsel stated that it had not been withdrawn, and the Court ordered that the parties move for summary judgment on, and brief, said claim.

13.3. In the event a plant is permanently shut down or a plant is relocated outside the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the toal Contributions made on behalf of all locations. From the funds so established, there shall be deducted:

(a) The reserves applicable to those Participants who have been transferred to other locations.

(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.

(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.

(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

Complaint, Exhibit B, pp. 27-28 (docket entry No. 1).

One other document is also involved here. To comply with the dictates of ERISA, the defendant drafted a pension plan[2] (hereinafter referred to as the "plan"), which provides, in pertinent part, as follows:

It . . . became necessary, in order to comply with ERISA, to establish a separate legal entity, the Pension Plan. During the period of time that there is in effect a collective bargaining agreement which specifically

[2] See 29 U.S.C. §1102, which requires a written plan.

> deals with pensions as to those employees that the Union represents . . . the said Pension Plan shall be construed in a manner consistent with those provisions as are provided for in any such collective bargaining agreement or any pension agreement addendum shall not be deemed to establish a pension benefit or rights outside of this Pension Plan. . . .

Complaint, Exhibit D, pp. ii-iii (docket entry No. 1). The plan also addressed the distribution of assets in the event of plant shutdown, and its provisions on this subject are virtually identical to those contained in the agreement with the exception of the provision governing distribution to the remaining participants (12.2[4]), which provides as follows:

> [4] The remaining assets, if insufficient to provide for all remaining accrued benefits, will, if permitted by law, be prorated among the remaining Participants in relationship to each Participant's established seniority to the total seniority of all remaining Participants for whom allocation is to be made under this subparagraph [4].

Complaint, Exhibit D, p. 53 (docket entry No. 1). The plan further addresses the issue of reversion of assets to the employer, as follows:

> (e) To the extent there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.

Complaint, Exhibit D, p. 59 (docket entry No. 1).

Plaintiffs contend that the agreement controls here and that, since the agreement provides for distribution to the remaining participants, they are entitled to the entire surplus, in the form of annuity benefits,[3] in accordance with §13.3 of the agreement. To achieve this end, plaintiffs asserted three claims for breach of ERISA's fiduciary mandates, which, as stated, the Court dismissed. Plaintiffs' LMRA claim asserts that, by drafting the plan in a manner inconsistent with the collective bargaining agreement and the agreement, defendant has violated its contractual obligations under the LMRA. As mentioned above, the Court hereby dismisses this final claim.

Before addressing the merits of the cross motions, the Court deems it appropriate to set forth the law governing a court's review of a motion for summary judgment. Summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions, on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Third Circuit has succinctly stated that summary judgment is warranted only upon a clear showing that no genuine issue of fact exists and that the law clearly favors summary judgment based on those facts. *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir. 1978). All inferences and disputes issues of material fact must be construed most favorably to the non-moving party. *Id.* This law guides the Court in its review of the cross motions.

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[3]At the pretrial conference in this case, plaintiffs informed the Court and the defendant that they are not seeking a lump-sum payment; rather, they request that the surplus be used to purchase annuities to be paid to the plaintiffs at the time that each reaches the age of 65.

A discussion of the merits of the cross motions must begin with the Court's opinion and order of September 29, 1983, concerning defendant's motion to dismiss, because part of the Court's discussion in that opinion serves as the foundation for the Court's decision here. Specifically, the Court recalls that defendant moved to dismiss the LMRA count on the ground that plaintiffs have failed to exhaust the agreed upon disputes procedure set forth in the agreements upon which they claim entitlement to relief. Rejecting defendant's contention, the Court stated as follows:

> As to the LMRA claim . . . . the Court also finds that this claim is not barred by plaintiffs' failure to exhaust the arbitration and grievance procedures. Defendant cites the Court to the United States Supreme Court decisions of *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554 (1976), *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965), and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), claiming that these three cases require that plaintiffs must exhaust their contractual remedies before bringing an action in federal court under the LMRA. The Court . . . rejects defendant's argument because the three Supreme Court cases cited above all involved situations in which a party was asserting a contractual right arising out of a collective bargaining agreement, rather than a violation of a federal statutory mandate. Count IV asserts a violation of a specific statutory mandate and is, thus, controlled by the *Alexander [v. Gardner-Denver Co.*, 415 U.S. 36 (1973)] and *Barrentine [v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)] decisions. . . . Since plaintiffs' claim in Count IV is based on rights arising out of a statute, it is not subject to arbitration.

Delgrosso v. Spang and Co., 586 F. Supp. 177, 182 (W.D. Pa. 1983) (footnotes omitted). Accordingly, the Court denied the motion to dismiss. It is important to note, however, that in ruling on the motion to dismiss, the Court restricted its review to the face of the pleadings and construed the pleadings most favorably to the plaintiffs as the non-moving party. *See id.* at 181 n. 8. Moreover, the Court cautioned plaintiffs that, once the case proceeded beyond the motion to dismiss stage, they (plaintiffs) would be required to prove a violation of a federal statutory mandate and would not be permitted to prevail by a showing of a mere breach of contract. *Id.* at 1982.[4]

Now that the case has reached the summary judgment stage, the Court is permitted to look beyond the pleadings in testing the claims in light of the applicable law. Here, plaintiffs' brief in support of their motion for summary judgment argues only breach of contract theories as a basis for awarding summary judgment in their favor and does not present any case law to establish that §301 of the LMRA has been violated here. Defendant, on the other hand, correctly points out that the record now reveals that plaintiffs' failure to exhaust the available contractual remedies requires dismissal of the LMRA claim. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel Co., v. Maddox*, 379 U.S. 650 (1965); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Court proffers two additional grounds for dismissing the LMRA count. First, in its opinion of June 1,

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[4]In sum, plaintiffs have opted to come directly to federal court, bypassing the available grievance and arbitration procedure, by asserting, in their complaint, statutory violations. Thus, plaintiffs must prove violations of federal statutory mandates and will not be permitted "to have their cake and to eat it too" by alleging violations of statutory mandates and then proving something less.

1984 in this case, *Delgrosso v. Spang and Co.*, C.A. 82-2672 (W.D. Pa.) (summary judgment on ERISA claims) (docket entry No. 62), the Court found that the plan was consistent with the agreements reached by the defendant and the union. The Court still adheres to that position, which serves to "take the heart out of" plaintiffs' LMRA claim. Second, in order for plaintiffs to bring this type of action against their former employer, they must "prove that the union as bargaining agent breached its duty of fair representation in that handling of the employee's grievance." *Vaca v. Sipes*, 386 U.S. 171, 186 (1967). Because plaintiffs did not allege an absence of fair representation by the union[1] and did not show any attempt to use the grievance and arbitration procedure, the claim must be dismissed. *See Hubicki v. ACF Industries, Inc.*, 484 F.2d 519, 522 (3d Cir. 1973).

For the foregoing reasons, plaintiffs' LMRA claim is dismissed. An appropriate Order will be issued.

Date: 8/29/84

.../s/ ALAN N. BLOCH...
United States
District Judge

cc: Counsel of record.

---

[1] In fact, the union's legal staff represents plaintiffs in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, et al.,
Plaintiffs,
vs.
SPANG AND COMPANY,
Defendant.

Civil Action No. 82-2672

JUDGMENT ORDER

AND NOW, this 29th day of August, 1984, upon consideration of Defendant's Motion for Summary Judgment on Count IV of the Complaint filed in the above captioned matter on July 9, 1984, IT IS HEREBY ORDERED that said Motion is GRANTED.

AND, further, upon consideration of Plaintiffs' Motion for Summary Judgment on Count IV of the Complaint filed in the above captioned matter on July 9, 1984, IT IS HEREBY ORDERED that said Motion is DENIED.

IT IS FURTHER ORDERED that, all claims now having been disposed of, judgment be and hereby is entered in favor of Defendant and against Plaintiffs.

/s/ ALAN N. BLOCH
United States District Judge

cc: Daniel P. McIntyre and Joy E. Klopp, Esquires
Five Gateway Center, Pittsburgh, PA 15222.

William T. Marsh, Esquire
P.O. Box 751, Butler, PA 16001.

Henry J. Wallace, Jr., and Robert F. Prorok, Esquires
747 Union Trust Building, Pittsburgh, PA 15219.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3618

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Appellants

v.

SPANG AND COMPANY

Appellee

No. 84-3644

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Cross-Appellees

v.

SPANG AND COMPANY
Cross-Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 82-2672)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellee/cross-appellant, Spang and Company, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court
/s/ LEONARD I. GARTH

Circuit Judge

DATED: NOV 4, 1985

APPENDIX G

[¶23,692 O] ADMINISTRATION OPPOSES MORATORIUM ON PLAN TERMINATIONS INVOLVING SURPLUS ASSETS

Following below is the text of a letter, dated September 20, 1985, written by William E. Brock, Secretary of Labor, James A. Baker III, Secretary of the Treasury, and Kathleen P. Utgoff, Executive Director of the Pension Benefit Guaranty Corporation, stating the Administration's opposition to a proposal by Congressman Edward R. Roybal for a nine-month moratorium on pension plan terminations involving surplus assets.

The Honorable Edward R. Roybal
Chairman, Select Committee on Aging
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I apologize for the delay in responding to your letters of June 19, 1985, and July 23, 1985, in which you requested Administration support for proposed legislation to impose a nine-month moratorium, subject to certain exceptions, on the issuance of Pension Benefit Guaranty Corporation Notices of Sufficiency and Internal Revenue Service Determination Letters with respect to pension plan terminations in which an employer recovers surplus plan assets of $1 million or more.

For the reasons stated below, the Administration opposes the proposed moratorium.

Under current law, the reversion of surplus assets to the plan sponsor following a valid termination is a legal

transaction, provided certain conditions to protect participants and beneficiaries are met. In May 1984, the three agencies that administer pension law (the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation) issued "guidelines" summarizing the requirements of current law [CCH PENSION PLAN GUIDE Transfer Binder (August, 1983-August 1985), ¶23,654K]. These guidelines have ensured that participants' rights under current law are protected. In addition, the guidelines have dealt effectively with one of the most important concerns regarding reversions: the fear that employers who recovered surplus assets would thereafter abandon defined benefit plans altogether. Subsequent to the issuance of the guidelines, a substantial majority of employers have chosen to continue defined benefit plan coverage for their employees after receiving a reversion.

Despite the public attention given particular terminations, asset reversions in excess of $1 million have not had a substantial impact on the defined benefit plan universe. Since 1980, such reversions have affected barely more than one percent of total defined benefit plan assets and less than six-tenths of one percent of such plans. Both financial and employee relations considerations limit the eagerness of companies to terminate plans and obtain reversions. Therefore, no widespread emergency exists that would justify such unusual action as a moratorium.

In our view, a moratorium on terminations involving surplus assets would be a disruptive action that could adversely affect the rights of plan sponsors and participants regardless of the facts underlying the decision to terminate. Such a disruption could have a chilling effect on the long-term willingness of plan sponsors to create, maintain, and properly fund defined benefit plans.

Although we oppose a moratorium, we recognize that asset reversions raise complex and important issues. We have been and remain willing to engage in constructive dialogue through whatever forums may be appropriate. In addition, we understand the need to obtain further information designed to evaluate more fully the impact of terminations involving asset reversions. In this regard, the Department of Labor will be conducting a review and analysis of this issue as soon as possible. This will provide additional information. Your counsel with respect to specific issues which should be examined is welcome.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Very truly yours,

WILLIAM E. BROCK
Secretary of Labor

JAMES A. BAKER III
Secretary of the Treasury

KATHLEEN P. UTGOFF
Executive Director, PBGC

Back references: ¶2525 and 10,185L.

Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1304

IN THE

Supreme Court of the United States

October Term, 1985

SPANG & COMPANY, *Petitioner*

vs.

MATTHEW A. DELGROSSO, et al., *Respondents*

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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23pp

QUESTION PRESENTED

Whether a court's interpretation of a particular collectively bargained Pension Agreement prohibiting an employer's recapture of surplus funds gives rise to an important national issue or presents a conflict among circuits, where the other circuits are merely affirming lower court interpretations of different agreements or plans.

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I. INTRODUCTION

With good reason, Spang's[1] petition would divert this Court's attention from its real quarrel with the decision below. For what discomforts Spang, and what determined the Third Circuit's decision, was the interpretation the Circuit placed on Spang's collective bargaining agreement. While Spang now claims to discern a "conflict" among the Circuits, the only "conflict" is that the Third Circuit interpreted a specific contract to prohibit reversion while other circuits, in *per curiam* decisions, have affirmed district court determinations that other, quite different contracts permit reversions. *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257 (D. D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984); *Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D. N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980); *In Re C.D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273, 1275 (3rd Cir. 1978).

Below, in our argument, we examine the purported "conflict" at somewhat greater length. Moreover, we attempt to correct Spang as to three points where its assertions tend to mislead, and hence, to confuse a proper analysis of this case: whether the Third Circuit correctly viewed Spang's plan as one which required defined contributions; whether the participants had adequately sought the remedy the Third Circuit ultimately ordered; and whether the Union "bargained away" the participants' right to the surplus.

---

1. Herein, we refer to the petitioner as "Spang" or "the Company," to the respondents as the "participants" and to the United Steelworkers of America as the "Union." From time to time we refer to the parties' Joint Appendix filed with the Third Circuit. We identify it as "Jt. App."

II. STATEMENT OF THE CASE

Successive Pension Agreements negotiated with the United Steelworkers of America, required Spang, the employer, plan sponsor, administrator and fiduciary, to fund and maintain a pension plan for the benefit of employees in its Ferroslag Division. Jt. App. at 685, 717, 737. Under pre-1974 Pension Agreements, the Company was obligated to fund the plan's benefits through contractually specified contributions; e.g., 40¢ per hour worked by each employee. *See, e.g.*, Jt. App. at 730 and 758. The parties determined benefits after fixing the contribution level. Jt. App. at 280-81 and 283. With the plan substantially overfunded, the parties agreed in the 1974 negotiations to convert Spang's funding obligation to actuarially determined variable funding. Jt. App. at 256, 688 and 712. Thereafter, Spang only needed to contribute the amounts necessary to fund the described benefits. Jt. App. at 256-57 and 412. Spang never contributed another penny to the fund after the conversion. Jt. App. at 412. Thus, the fund consists entirely of fixed hourly contributions and investment proceeds thereon.

Since 1970 all Pension Agreements have unequivocally prohibited reversions to Spang. Jt. App. at 730, 758-762, and 860-863. The most recent 1980 Pension Agreement provides (as did earlier Agreements):

> 12.6 The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the

Pension Fund, except as specifically provided in this Agreement.

* * *

13.3 In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:

(a) The reserves applicable to those Participants who have been transferred to other locations.

(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.

(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.

(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

* * *

Jt. App. at 860-63.

In the 1980 negotiations toward a new Pension Agreement, Spang proposed that the parties remove the prohibition against reversion and adopt instead a clause stating that upon termination or partial termination of the plan any balance remaining in the fund after allocations for vested and accrued benefits would be paid to the Company. Jt. App. at 235-38 and 324-25. The Union

rejected this proposal, insisting on retaining the prohibition against reversion of assets. Jt. App. at 238.

In 1981, however, Spang drafted several pension plan documents, dating them 1976, 1977 and 1980. Jt. App. at 353-57. These pension plans purported to provide for precisely the reversionary privileges the Union refused to grant to Spang in negotiations.[2]

Spang closed two of its Ferroslag Division facilities prior to 1980. Jt. App. at 264. On neither occasion did Spang appropriate any "surplus assets." Rather, all monies remained in the fund. Jt. App. at 689.

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2. The reversionary clause rejected in negotiations read:

> 13.3 If the assets in the Pension Trust Fund are more than sufficient to provide the full allocations as set forth in such subparagraphs (a) through (e) of Section 13.1, then any balance remaining in the Pension Trust Fund shall be paid to the Company.

The "1980 plan" secretly drafted by Spang read:

> (e) To the extent there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.
>
> Jt. App. at 324-25 and 153.

Spang's unilateral plan attempted to provide for reversion in other, indirect ways accurately described by the Third Circuit in its Opinion. *DelGrosso v. Spang & Co.*, 769 F.2d 928, 931 (3d Cir. 1985).

In July 1982, Spang closed the last Ferroslag plant in Lorain, Ohio. Jt. App. at 688. After setting aside monies to cover the present value of the vested and accrued benefits of the 51 Lorain participants, there remains a substantial surplus in the fund. Jt. App. at 1050. According to Spang, that surplus in August 1982 equaled approximately $700,000. Jt. App. at 1050; Brief of Appellee and Cross-Appellant at 8, filed January 21, 1985, in Nos. 84-3618 and 84-3644.

Participants claimed and the Third Circuit held that Spang breached its fiduciary duty when it unilaterally drafted plan documents which contravened the controlling Pension Agreement by purporting to arrogate to Spang a right to the surplus monies. Jt. App. at 15-17; *DelGrosso v. Spang & Co.*, 769 F.2d 928, 929 and 937 (3rd Cir. 1985). ERISA, 29 U.S.C. §1104(a)(1)(D).

III. ARGUMENT

The parties are in complete agreement over the principles of law that govern this case. We note the more salient points here:

1. *A contract regulating employees' benefit entitlement constitutes a document which, in ERISA's terms, governs the plan. 29 U.S.C. §1104(a)(1)(D).*

2. *Spang's negotiated Pension Agreement did, in fact, control its pension plan. The Pension Agreement provided with utter specificity that "the Plan shall be amended to provide as set forth" in the Pension Agreement.*

3. *ERISA forbids a reversion which violates a collectively bargained pension agreement.*[3]

Taken together, these undisputed propositions sharply focus the fundamental issue which this case presents: whether or not Spang's Pension Agreement restricted the Company's right to recapture assets. The Third Circuit found it did. Indeed the clause that prohibited reversion admitted of "not the slightest ambiguity" and was "simply not susceptible to a restrictive interpretation." *Delgrosso, supra,* 769 F.2d at 935 and 938.

In its petition here, Spang undertakes to demonstrate an error in the Third Circuit's interpretation. To be sure, Spang couches its presentation in terms of an "Important National Issue" and a "Conflict with the Results in Other Circuits." Petition ("Pet.") at 8. Yet, after removing the chaff, the argument's kernel is limp indeed:

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3. ERISA now prohibits the Pension Benefit Guaranty Corporation from proceeding with a plan termination which violates a collective bargaining agreement. ERISA, Sec. 4041(a)(3), 29 U.S.C. §1341(a)(3), as amended by the Single-Employer Pension Plan Amendments Act of 1986, P.L. 99-272.

other courts have interpreted other contracts and determined that the different language of those other contracts permitted reversion. *See,* cases cited *supra* at 1.

Spang's anti-reversion clause bears no relationship whatsoever to the language in *Washington-Baltimore* and *Pollock,* the decisions of the other Circuits on which Spang relies. The plan documents in those cases restate ERISA's "exclusive benefit" rule, saying, in essence, that funds may not be diverted to a purpose other than for the exclusive benefit of participants. Those Courts felt free to interpret this "boilerplate" language narrowly. *See, e.g., Washington-Baltimore, supra,* 555 F. Supp. at 261; *Pollock, supra,* 476 F. Supp. at 612. But Spang's Agreement flatly prohibits reversion, without reference to the "exclusive benefit" rule. The interpretation of such dissimilar contracts cannot create a conflict in the circuits.

Admittedly, Spang assesses the "strength" of the anti-reversion language of these other plans and rates some "much stronger than the agreement in this litigation." Pet. at 11. Apparently it attaches significance to, and sees a conflict in, the Third Circuit's gauging Spang's Agreement from a different vantage. In fact, Spang's different view merely illustrates an inherent characteristic of the interpretative function; it necessarily involves a subjective element. For while Spang understands the other courts to have confronted stronger clauses, the Third Circuit was equally adamant that it faced language that "unlike the anti-reversion clauses in those other cases, is simply not susceptible to a restrictive interpretation." *DelGrosso, supra,* 769 F.2d at 935.

Spang's disagreement with the Third Circuit's interpretation does not rise to the level of a nationally important question nor does it indicate a conflict between the

Circuits.[4] For all the courts, the Third Circuit as well as those district courts on whose *per curiam* affirmances Spang relies, agree on the controlling legal principles. Each of these district court opinions agree (1) that, in conformity with ERISA, an employer who would recapture plan assets must evidence a valid plan provision permitting reversion and (2) that a provision violative of an employer's contractual obligations will not pass muster. 29 U.S.C. §1344(d)(1)(c). *See, e.g., Washington-Baltimore, supra,* 555 F. Supp. at 259 and 263-64; *Pollock v. Castrovinci, supra,* 476 F. Supp. at 616-17. Similarly, confronted by a contention that reversion is in breach of a controlling plan document, each of those courts correctly categorized the resultant dispute as one of contract interpretation. *See, e.g., Washington-Baltimore, supra,* 555 F. Supp. at 260-61. Thus, there is no disagreement as to the principles which ultimately determine an employer's entitlement to reversion. There remains only Spang's contention that, though the Third Circuit concededly applied these very principles, it reached the wrong result.

For two reasons, this case is a most inappropriate one to review an interpretation of an anti-reversion

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4. Nor is "grave doubt" created by *DelGrosso* as to employers' reversionary rights. Pet. at 12. Spang's attempt to portray the supposed "conflict" as one which would "chill" employers desire to create new pension plans or fund such plans cautiously is spurious. The law is indisputably clear and simple to follow: an employer need only create a defined benefit plan which specifically provides for reversion of surplus assets (or negotiate a Pension Agreement expressly permitting reversion) and the legitimacy of a later reversion of surplus cannot be questioned. Spang's error was in trying to invoke ERISA's Section 4044(d) even though its collectively bargained Agreement prohibited reversion.

clause. First, given the unique facts here, the Third Circuit was palpably correct that Spang's Pension Agreement flatly prohibited reversion. Second, even were that interpretation questionable, other clauses in the Agreement resolve that doubt against Spang's claim to the surplus. Thus, the Circuit properly held that Spang failed its duty to observe the instruments controlling the plan when it prepared formalized plan documents that derogated from the Pension Agreement.

The Circuit's interpretation properly reflected the Pension Agreement's plain language as well as the history which undergirded that language. The Circuit focused on the clause which provided that "contributions made by the Company hereunder may not, under any circumstances, revert to the Company." If contributions meant the whole of the fund, then there could be no reversion.

A number of facts bore on the proper interpretation. First, the entire fund surplus derived from Spang's contributions pursuant to a collectively bargained formula that obligated it to pay a stated number of cents for each hour one of its employees worked. Though Spang and the Union later amended that obligation, requiring instead that Spang maintain the fund on an actuarially sound basis, Spang never contributed a cent subsequent to this change.[5] Jt. App. at 412. The existing fund, composed of Spang's cents-per-hour contributions and swelled by income on those contributions, continually exceeded plan liabilities.

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5. Throughout its petition, Spang invokes sympathy as one who, assuming the "risk of poor investment performance," nonetheless agreed "to be bound by the additional obligation . . . of potential indefinite funding." Pet. at 14, 16. Spang fails to note the calculated nature of its

The second significant fact was Spang's own recognition of the limits which the Pension Agreement imposed on it. For though Spang now claims that its Agreement permits reversion, in collective bargaining in 1980 Spang quite carefully proposed replacing the Agreement's prohibition against recapture with a provision permitting Spang to claim a reversion. Jt. App. at 235-38 and 324-25. The Union, however, rejected that proposal, opting to retain the clause that flatly prohibited Spang's recapturing surplus. Jt. App. at 238. It was in the face of this rejection at the bargaining table that Spang subsequently inserted a reversion clause in the plan it drafted.[6]

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risk. First, Spang structurally limited its risk when it limited its contractual liability to making the actuarially determined contributions. Pension Agreement, Sec. 12.4, Jt. App. at 65. That clause effectively limited its exposure for benefits to those guaranteed by Title IV of ERISA. *Nachman Corp. v. PBGC*, 446 U.S. 359, 384-86 (1980). Second, Spang accepted this "risk" fully aware of its entirely hypothetical nature. At the time of the conversion to "defined benefit" funding, the plan was so overfunded that it required no contributions. Jt. App. at 258-63, 336-338, and 688-89. Subsequently, Spang carefully preserved the surplus by refusing to negotiate even those pension benefit improvements which the fund could bear. Jt. App. at 679-681.

6. Spang insists that ERISA required that it draft a formal pension plan. This contention, standing alone, misleads. Though ERISA requires that plans be established pursuant to a written instrument, 29 U.S.C. §1102(a)(1), it does not forbid a Pension Agreement's fulfilling that office. *Cf., Murphy v. Heppenstall*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982); *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559, 567 (N.D. Oh. 1978). Indeed, Spang's Pension Agreement did serve as the formalized plan until at least 1981. It was only then that Spang drew up "plans" and backdated them to 1976 and 1980. Below, Spang claimed the Pension Agreement could not validly serve as the plan because it lacked

Confronting these facts and reading the anti-reversion clause in light of other provisions in the Agreement, the Circuit concluded that the Pension Agreement, which by its terms barred Spang's recapturing any contributions, prohibited a reversion of the surplus.[7] While advocates can quibble over the rigor of the Circuit's interpretation, such a dispute will never implicate an important national question. And only because it gives "result" a caged meaning is Spang accurate in its assertion that the Third Circuit's "result" differs from that of other circuits. By result Spang means who prevails—the employer or the participants. But different results are predictable where the analysis rests on the interpretation of different agreements or plans and is shaped by different facts.

Even had the Circuit erred in construing the Agreement's recapture clause as a total prohibition on reversion, still the Agreement would support the Circuit's holding that Spang violated its §1104(a)(1)(D) fiduciary

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some provisions ERISA required. In this regard, we note that Spang and the Union purported to comply with ERISA when they added a number of required provisions in 1976. Jt. App. at 801. If these efforts did not suffice to maintain the plan's tax qualified status, then the Agreement itself embodied a procedure which the parties could utilize to make the necessary adjustments. That procedure, of course, foresaw mutual agreement as the proper means of modifying the Agreement. In short, nothing in ERISA mandated the particular course Spang followed: the unilateral drafting of a plan, concealing its drafting from the Union, and adorning it with a variety of clauses that served no one's interests other than Spang's.

7. Spang slyly suggests that the Circuit limited its holding to that portion of the surplus attributable to Lorain. We note our objection solely to preserve our rights should Spang subsequently resurrect this brazen misstatement of the Circuit's decision.

duty by drafting a formal plan in contravention of the controlling plan documents. For other of the Agreement's provisions also fettered Spang's freedom to claim a reversion. First, the Agreement purported to allocate all the funds, not merely contributions, upon termination.[8] Moreover, the Agreement flatly precluded Spang's raising any extra-contractual claim to the funds, stating that the Company shall have no "right, title or interest in or to *any* of the funds in the Pension Fund, *except as specifically provided in this Agreement.*" Jt. App. at 66 (emphasis supplied). In short, the Agreement occupied the field completely, leaving Spang no loop-hole through which to weave its claim to a reversion. These provisions then, lend added emphasis to the Circuit's holding that "any plan provision permitting reversion is not 'in accordance with the documents and instruments governing the plan' under ERISA Section 1104(a)(1)(D), and any plan provision so providing is ineffective. It follows that

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We note here, also, Spang's suggestion that payment of benefits will consume all the Lorain contributions. This assertion is both speculative and irrelevant. Neither the Agreement nor the "plan" earmarks contributions as the first source of benefit payments. Only Spang, the fiduciary administrator, gleans this hierarchy in the plan. It does so since even Spang recognizes the prohibition against its recapture of "contributions," a recognition which requires that it eradicate the label "contributions" from the sums it would appropriate. In the end, this intricate accounting lacks any relevance. Since the plan lacks a valid reversion clause, ERISA allocates the entire surplus among all the plan participants. 29 C.F.R. §2628.—32(a).

8. Its Section 12.6 provided:

"If this Pension Plan shall terminate, the funds under the Pension Plan shall be used in the manner provided in Section 13." Jt. App. at 66.

Spang breached its fiduciary duty by failing to administer the Plan in accordance with the governing documents, i.e., the Pension Agreement." 769 F.2d at 735-36.[9]

As we noted initially, we close our response by correcting just three of the assertions Spang makes that tend to mislead this Court and confuse the issue. The first is the contention that the Circuit erred when describing Spang's as a "defined contribution" plan. The second is Spang's suggestion that the Circuit imposed a remedy foreign to any relief the participants' had sought.

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9. In a footnote, Pet. at 10, n. 10, Spang suggests this holding contradicts an otherwise unanimous body of doctrine that "the creation and termination of a plan are not fiduciary functions under ERISA." Spang ignores, however, that it was not "creating" a plan when it secretly and unilaterally drafted its plan document. A reticulated plan already existed, embodied in the controlling Agreement which commanded conformity to its terms. This removed Spang's discretion as to what the plan said. Spang's self-serving reversion clause is hardly the only term Spang added to its plan. We mention but one other: a clause which permitted Spang to tap the pension funds to meet the Company's completely independent obligation to provide retiree health insurance. *DelGrosso, supra*, 769 F.2d at 931. Such self-dealing directly violates ERISA's exclusive benefit rule. *See, e.g., Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

The "creation of plan" cases which Spang cites offer it no comfort since its conduct was not creation, but transcribing. In assessing its conduct, this Court's decisions in *United Mineworkers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 574 (1982) and *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) offer far more relevant guidance: once an employer leaves the bargaining table he must adhere to the bargain he struck at the risk of breaching the fiduciary duty ERISA imposes.

The third is the Company's insistence that the participants' Union bargained away their right to the fund.

Measured against ERISA's definitions, the Third Circuit arguably erred in describing Spang's pre-1974 pension arrangements as a defined contribution plan. In fact, since the plan specified a benefit formula, post-ERISA jurisprudence would undoubtedly classify it as a defined benefit plan. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979). Spang is an unseemly critic of the Circuit's choice of language, however, since Spang itself introduced this ambiguous usage into the case.[10] Indeed,

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Spang also incorrectly asserts that decisions relating to plan termination are within the sole discretion of the fiduciary and outside the fiduciary duty standards. Pet. at 10, n. 10. Certainly, the fiduciary's right to terminate the plan may be limited by contract. *See, e.g.*, ERISA, Sec. 4041(a)(3), 29 U.S.C. §1341(a)(3); *Maas v. Dubuque Packing Co.*, 754 F.2d 287 (8th Cir. 1985), *on rhg.*, 757 F.2d 194 (1985). In addition, the Department of Labor emphasized in a recent letter that "activities undertaken to implement the termination decision are generally fiduciary in nature" and thus subject to fiduciary strictures. DOL Op. Letter, 13 *BNA Pension Reporter* 472-73 (March 17, 1986). The Department went further, citing the *DelGrosso* opinion for the proposition that fiduciary standards may indeed govern the decision to terminate a collectively bargained plan. *Id.*

10. In its very first narrative of fact, Spang asserted that: "In the 1974 pension agreement covering Lorain and Chicago, Spang and the Steelworkers agreed to change the pension benefit provided from a 'defined contribution' to a 'defined benefit.' " Defendant's Brief In Support Of Its Motion To Dismiss, filed June 26, 1983 in C.A. No. 82-2672 in the United States District Court for the Western District of Pennsylvania. Spang persisted in this characterization of the pre-1974 plan. Jt. App. at 203, lines 19-22; 254, lines 19-24; 393, lines 2-7. Spang

it was not until petitioning for rehearing that Spang objected to the label. Spang's acquiescence is understandable, however, since no one disputed the more significant fact that the Circuit expressed through the shorthand "defined contribution." Prior to 1974, Spang paid into the plan an agreed upon number of cents-per-hour.[11] The entirety of the plan's funds today derive from contributions made before 1974, "pursuant to a defined contribution agreement."[12] 769 F.2d at 935; *see, also,* Jt. App. at 688. That undisputed fact, to the Circuit's mind, eviscerated Spang's prudent funder argument. Spang simply could not wrap itself in the mantle of the prudent funder as all it had done was make the contributions required by

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even characterized the plan in this manner in its opening brief to the Third Circuit. See, Brief of Appellee and Cross-Appellant at 32, n. 12.

11. Indeed, in those days the parties determined benefits only after agreeing upon the contributions. Jt. App. at 280-1 and 283.

12. Spang asserts that "actuarial error" is a concept of sufficient breadth to account even for its surplus. To be sure, the *general* rule classifies any excess assets as an actuarial surplus. Ronald A. Pearlman, Assistant Secretary of the Treasury for Tax Policy, 12 *BNA Pension Reporter* 482, 484 (April 1, 1985). Whether the general rule applies to Spang's surplus is, however, an open question and one whose answer, given the extraordinarily peculiar facts involved, is unlikely to instruct as to more common situations. For no actuarial determinations dictated any of Spang's contributions, these flowing instead from the economic package it struck with the Union. Benefits were determined after the contributions were set. Jt. App. at 280 and 283. As noted, the subsequent actuarially based funding provision never required any contributions. Spang's claim of actuarial error, absent any actuarial determination, is simply too removed from the typical situation to raise issues of broad concern.

an Agreement that expressly precluded its recapture of those contributions.

Spang also asserts that the Circuit ordered a remedy which the participants had not sought. This assertion lacks even the grace of literal correctness, since the participants prayed for the very relief the Circuit ordered. In essence, the Circuit reformed the plan and ordered the appointment of a disinterested fiduciary, noting that that fiduciary could terminate the plan and disburse the surplus pursuant to the very rule which governs such disbursements where no plan provision obtains. *DelGrosso, supra*, 769 F.2d at 938. In their Complaint, Plaintiffs sought, among other relief, appointment of an independent administrator and reformation of the plan. 769 F.2d at 932; Jt. App. at 17-18. Throughout this litigation, Plaintiffs repeatedly asserted that—if they failed in their own claim to the surplus—the appropriate remedy was appointment of an administrator who could distribute the pro-rata share to all participants.[13] Though Spang now claims surprise, its Pre-Trial Narrative cautiously responds to the participants' request for an independent

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13. *See, e.g.*, Plaintiffs' Reply Brief In Support Of Plaintiffs' Motion For Summary Judgment And In Opposition To Defendant's Cross Motion For Summary Judgment, at 20, n. 11 and 28, n. 20, filed October 31, 1983; Brief In Support Of Plaintiffs' Motion For Summary Judgment On Count IV, at 3-5 and n. 2 and 3, filed July 9, 1984; Defendant's Brief In Opposition To Plaintiffs' Motion For Summary Judgment, at 4, n. 1 (wherein Defendant responds to Plaintiffs' assertion), filed July 27, 1984; and Plaintiffs' Reply Brief In Support Of Plaintiffs' Motion For Summary Judgment On Count IV And In Opposition To Defendant's Motion For Summary Judgment, at 3, n. 1, filed July 30, 1984, all filed in the United States District Court for the Western District of Pennsylvania in Civil Action No. 82-2672.

administrator. Jt. App. at 635. Spang is simply in error in suggesting otherwise.

Spang's final assertion is perhaps its most devious. It suggests that the Union "negotiated away the benefit of the investment performance on the cents-per-hour contributions." Pet. at 16. For one reason, we welcome that assertion since it demonstrates Spang's recognition that, at least prior to 1974, the Agreement assigned to the participants the entirety of the fund, both the contributions and the income they produced. The record discloses no point, however, at which the Union bargained this interest away. The parties bargained but one change relevant to funding: that which relieved Spang of its cents-per-hour obligation and substituted the actuarially based formula that produced no contributions. Consistently, the parties renewed the prohibition against Spang's recapture and the Agreement's explicit articulation that Spang had no interest in any of the funds. The Union rejected, and Spang withdrew, a bargaining proposal that would grant Spang a right to the surplus. This bargaining history simply will not support Spang's assertion that the Union negotiated away "the benefit of the investment performance on the cents-per-hour contributions" which Spang concedes the participants had earlier enjoyed.

IV. CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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